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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1583

FRANCES MORRIS, ET AL., APPELLANTS,

versus

L. MARION GRESSETTE, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF FOR APPELLEES

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On Appeal from the United States District Court for the District of South Carolina

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BRIEF FOR APPELLEES

QUESTION PRESENTED

Whether the State of South Carolina, having made a proper submission of its 1972 Senate reapportionment plan to the United States Attorney General and having received no objection to the plan within sixty days after submission, is authorized under Section 5 of the Voting Rights Act of 1965 to enforce the plan?

STATEMENT OF THE CASE

This is a suit by appellants to enjoin enforcement of the South Carolina Senate reapportionment plan (hereinafter the "Senate Plan") enacted by the General Assembly of South Carolina in Act 1205 of 1972,[1] on the ground that it has not been precleared under Section 5 of the Voting Rights Act of 1965.[2]

Three days after the Senate Plan was signed into law, it was submitted to the Attorney General for review and preclearance under Section 5 of the Voting Rights Act. The submission was received by the Attorney General on May 12, 1972, and was considered by him to be complete under

[1] 57 STAT. 2384 (1972). Section 2 of Act 1205 contained two Senate reapportionment plans, Plan A and Plan B. Plan B was to take effect only if Plan A was declared invalid by the courts. It is Plan A that is the subject of this litigation. Section 3 of Act 1205 related to numbered seats in the House of Representatives. The Attorney General objected to Section 3 and it was never enforced.

[2] 42 U. S. C. § 1973c. The statute provides in pertinent part:

> Whenever a State . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, . . . such State . . . may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, . . . and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure, has been submitted by the chief legal officer or other appropriate official of such State . . . to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. . . . Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

his own guidelines [3] as of that date.[4] The sixtieth calendar day after May 12, 1972, was July 11, 1972. On June 30, 1972, the Attorney General responded to the submission of the Senate Plan in a letter addressed to Daniel R. McLeod, the South Carolina Attorney General. In the letter the Attorney General stated that he interposed no objection to the Senate Plan.[5] It is conceded that, other than this letter of June 30th, the Attorney General conveyed no decision to the State of South Carolina either objecting or not objecting to the Senate Plan on or before July 11, 1972.[6]

Appellants rely on a subsequent objection to the Senate Plan interposed by the Attorney General on July 20, 1973,[7] pursuant to a court order in *Harper v. Kleindienst*,[8] to support their cause of action. The events leading to that objection begin in 1971.

Harper I

After the 1970 census figures were published in 1971, the General Assembly enacted Act 932 of 1971 [9] containing alternate plans for the reapportionment of the State Senate (hereinafter the "1971 Plans"). The 1971 Plans were promptly submitted to the Attorney General for preclearance pursuant to Section 5 of the Voting Rights Act and were received by him on November 22, 1971.[10] The Attorney

[3] 28 C. F. R. § 51 *et seq.*

[4] A. 33. See also Defendants Motion to Dismiss of October 16, 1972, *Harper v. Kleindienst*, Civil Action No. 1607-72 (D. D. C. 1972), Appendix A, *infra*, at 2a.

[5] See Letter of June 30, 1972, from David L. Norman to Daniel R. McLeod, A. 47-50. Appellants' statement (Brief for Appellants 7) (hereinafter cited as "Br. App.") that the "Attorney General declined to object to Section 2 of Act 1205, explaining that he would not exercise his own judgment under Section 5 . . ." is not accurate. No such explanation appears in the letter.

[6] Stipulations, Par. 1, A. 53.

[7] A. 51-52.

[8] 362 F. Supp. 742 (D. D. C. 1973), affirmed *sub nom. Harper v. Levi*, 520 F. 2d 53 (D. C. Cir. 1975).

[9] 57 STAT. 2071 (1971).

[10] See Letter of March 6, 1972, from David L. Norman to Daniel R. McLeod, A. 26.

General requested additional information from the State, which was received by him on January 5, 1972.[11] The Attorney General then considered the submission to be complete and under his guidelines the sixty-day period of Section 5 began to run.[12]

Shortly after the State submitted the 1971 Plans, a suit was brought in the District Court for the District of South Carolina on behalf of all black voters who resided in multimember Senate districts. The plaintiffs sought an injunction against enforcement of the 1971 Plans on the ground, *inter alia*, that their use of multimember election districts abridged the rights of black voters on account of race or color. This suit will be referred to as *Harper I* in this brief.[13] The *Harper I* plaintiffs also claimed that the 1971 Plans violated Section 5 of the Voting Rights Act, that they had not been precleared pursuant to Section 5, and that they could not be enforced by the State until preclearance was obtained.

At the request of the *Harper I* District Court, the Attorney General submitted an *amicus* memorandum in which he advised that the court might wish to defer ruling on the Fourteenth and Fifteenth Amendment questions raised by the *Harper I* suit until the Attorney General had completed his Section 5 review.[14] The Attorney General also advised that any question of whether the 1971 Plans had the purpose or effect of abridging minority voting rights under Section 5 could be determined only by the District

[11] *Id.*
[12] *Id.*
[13] *McCollum v. West*, C. A. 71-1211 (D. S. C., Complaint filed Dec. 7, 1971) (unreported). One of the named plaintiffs in *McCollum* was John Roy Harper II. *McCollum* was consolidated with several other cases challenging the 1971 Plan, all of which are sometimes referred to under the style of *Twiggs v. West*. This usage is misleading, since *Twiggs* was a Fourteenth Amendment suit presenting no question of minority voting rights *per se*.
[14] Memorandum for the United States, filed Feb. 1, 1972, in *McCollum v. West*, C. A. 71-1211 (D. S. C. 1972), 6-7, 8. This document is Exhibit 1 to Deposition of James P. Turner (R., Document #20).

Court for the District of Columbia.[15] Contrary to the statement of appellants,[16] the Attorney General did not ask the court to enjoin enforcement for lack of preclearance without reaching the constitutional issues raised by the plaintiffs.

On March 6, 1972, the Attorney General interposed objection to the 1971 Plans, stating only that he was "unable to conclude" that the use of multimember districts in combination with a majority vote requirement in the primaries and numbered Senate seats would not have the effect of abridging black citizens' right to vote on account of race or color.[17]

On April 7, 1972, the District Court in *Harper I* struck down the 1971 Plans, finding that they violated the Fourteenth Amendment one man, one vote principle. In its order, the *Harper I* Court expressly rejected the racial discrimination claims of the plaintiffs, claims that had been the subject of an extensive evidentiary record and full briefing and argument by counsel.[18] As noted by appellants, the court did not rule on the merits of the Section 5 claims.[19] The court retained jurisdiction, but declined to draw a constitutional reapportionment plan itself unless the General Assembly failed to do so within thirty days.

On May 6, 1972, a new Senate reapportionment statute, containing the Senate plan now at issue, was signed into law by the Governor of South Carolina. This new plan was filed with the District Court for review under its retained jurisdiction to determine whether it satisfied the constitutional guidelines established in the court's April 7th order.

[15] *Id.* 5-6.
[16] See Br. App., 6.
[17] Letter of March 6, 1972, from David L. Norman to Daniel R. McLeod, A. 26-28.
[18] Order of April 7, 1972, *Twiggs v. West*, Civil Action No. 71-1106 (D. S. C. 1972) Jurisdiction Statement App. 26a-49a (hereinafter cited as "J. S.").
[19] Br. App. 6-7.

On May 23, 1972, the District Court entered an order approving the Senate Plan. A further order of June 9, 1972, rejected the claim of the *Harper I* plaintiffs that the Plan was racially discriminatory. From these decisions two appeals were noticed to this Court. One, *Powell v. West,* challenged the District Court's approval of the Senate Plan *sua sponte* without requesting the parties to present their views on it. This Court affirmed the District Court's order in the *Powell* appeal.[20] The second appeal, noticed by the *Harper I* plaintiffs, was based on Fifteenth Amendment grounds. This appeal was not perfected,[21] as will be more fully discussed below.

Harper II

After considering the submission of the Senate Plan for seven weeks, the Attorney General on June 30, 1972, stated that he would defer to the determination of the *Harper I* District Court and would enter no objection to the implementation of the Senate Plan.

On August 10, 1972, thirty days after the sixty-day period for objecting to the Senate Plan had expired, two of the named plaintiffs in *Harper I,* John Roy Harper II and Victoria DeLee, commenced an action in the District of Columbia challenging the Attorney General's failure to object to the Senate Plan. This suit,[22] which will be referred to as *Harper II* in this brief, rested on a claim that the Attorney General had erroneously taken into consideration the decision in *Harper I* in reaching his own decision not to object to the Senate plan. *Harper II* was brought on behalf of the same class of plaintiffs as *Harper I.* On August 10, 1972, the period in which the *Harper I* plaintiffs could perfect their appeal had not yet expired, and would not expire

[20] *Powell v. West,* 413 U. S. 901 (1973) (memorandum opinion).
[21] See Stipulations, Par. 7, A. 54.
[22] *Harper v. Kleindienst,* 362 F. Supp. 742 (D. D. C. 1973).

for over three months.[23] The plaintiffs chose to bring the *Harper II* action and chose not to press their *Harper I* claim that the Senate Plan was racially discriminatory on appeal to this Court.

On August 11, 1972, the single-judge District Court in *Harper II* entered an interlocutory order purporting to extend the time during which the Attorney General might interpose an objection to the Senate Plan. This order was based on a finding of "fact" that the time in which the Attorney General might interpose objection to the Senate Plan under Section 5 had not expired.[24]

Some nine months later, on May 16, 1973, the District Court entered an order finding that the Attorney General's refusal to object to the Senate Plan was clearly erroneous. In response to the plaintiffs' contention that the Attorney General "made no findings at all" in deciding not to object to the Senate Plan, the District Court ordered the Attorney General to make a "reasoned decision in accordance with his statutory duty." [25] In response to this order, the Attorney General filed a memorandum in which he stated that the Senate Plan "has a clear and substantial racial effect in contravention of the Fifteenth Amendment and its protections under Section 5 of the Voting Rights Act." [26] In reaching his conclusion that the Plan violates the Fifteenth Amendment, the Attorney General noted that it would be possible to draw single-member election districts which "would have resulted in four or five election districts with black population majorities." [27] Nevertheless, the Attorney

[23] See Stipulations, Par. 7, A. 54.
[24] See Order of August 11, 1972, *Harper v. Kleindienst,* 362 F. Supp. 742 (D. D. C. 1972), Br. App., Appendix A, 1a-2a.
[25] 362 F. Supp. at 746.
[26] See Memorandum of United States in Response to the Court's Order of May 16, 1973, (filed July 16, 1973) in *Harper v. Kleindienst,* 362 F. Supp. 742 (D. D. C. 1973), Br. App., Appendix B, 8a.
[27] *Id.* at 6a.

General declined to enter an objection to the Senate Plan because he felt constrained to defer to the Fifteenth Amendment determination of the *Harper I* court.[28]

On July 19, 1973, the District Court entered a second order stating that Section 5 of the Voting Rights Act required the Attorney General to object to the Senate Plan. Pursuant to the District Court's order, the Attorney General objected to the Senate Plan on July 20, 1973, over one year after the expiration of the sixty-day period.[29]

The District Court's order in *Harper II* was affirmed by a three-judge panel of the Court of Appeals, one judge dissenting, on July 24, 1975.[30] That review became final on October 22, 1975, when the time for filing a petition for a writ of *certiorari* in this Court expired.

The Proceedings Below

The appellants filed this suit on November 7, 1975, alleging in their complaint that South Carolina had not obtained authority to enforce the Senate Plan under Section 5. It was conceded by all parties at the outset that the racial discrimination issues litigated in *Harper I* were not presented in this case and were not being relitigated.[31] It was also conceded by all parties that the Senate Plan is legislation covered by the Voting Rights Act and that compliance with the preclearance provisions of Section 5 of the Act is a prerequisite to implementation of the Plan by South Carolina. The appellants presented three main arguments below: (1) they claimed that the State of South Carolina was collaterally estopped by the *Harper II* decision and, therefore, could not present a defense on the merits; (2)

[28] *Id.* at 8a, 11a.

[29] See Letter of July 20, 1973, from J. Stanley Pottinger to Daniel R. McLeod, A. 51-52.

[30] *Harper v. Levi*, 520 F. 2d 53 (D. C. Cir. 1975).

[31] See Excerpts from Pretrial Conference held Dec. 4, 1975, in *Morris v. Gressette*, Civil Action No. 75-1998 (D. S. C. 1975), A. 13-15.

they claimed that the *Harper II* decision was correct in holding that the Attorney General's non-objection was reviewable under the Administrative Procedure Act; and (3) they claimed that the Attorney General was legally erroneous in considering the *Harper I* decision as a basis for his non-objection. The appellees argued in reply that: (1) the State was not estopped by *Harper II* from contesting on the merits; (2) that the Attorney General's failure to object within sixty days authorized South Carolina to enforce the Senate Plan; (3) that the Attorney General's non-objection was not reviewable under the APA; (4) that the Attorney General's subsequent objection to the Senate Plan was additionally invalid because it was interposed by order of a court acting without jurisdiction; and (5) that the Attorney General's decision to defer to the *Harper I* decision was legally proper and within his discretion under Section 5.

The United States filed an *amicus curiae* memorandum, in which it declined the invitation of the District Court to participate in the case on the ground that it was "unable at this time to fully address the issues in this case."[32] Attorneys from the Justice Department also appeared at the hearing before the three-judge court, but declined to participate in oral argument.

On March 12, 1976, the District Court filed its opinion and order. On the question of collateral estoppel, it held that South Carolina was not precluded by *Harper II* from defending the suit on the merits. On the merits, the District Court held that the Attorney General's failure to object

[32] Amicus Memorandum of the United States, filed January 28, 1976, in *Morris v. Gressette*, Civil Action No. 75-1998 (D. S. C. 1976), 4. Appellants' statement (Br. App. 11) that the "United States, appearing as amicus curiae, acknowledged the correctness of the *Harper* determination that the Attorney General was obligated to reach his own independent judgment on Act 1205" is inaccurate. No such statement appears in the Memorandum. The United States did state that because of the Supreme Court's decision in *Connor v. Waller*, "the Attorney General decided not to seek further review of the *Harper* decision." *Id.* 8.

within the sixty-day period was not reviewable under the APA because:

> the action of the Attorney General under § 5 . . . is (1) not adjudicatory, and (2) any party with standing who was dissatisfied with his action had an "adequate remedy in a court," and (3) there were not simply "persuasive" but compelling reasons to believe nonreviewability of that action was "the purpose of Congress." [33]

The Court, therefore, concluded that

> the determination made by the Attorney General under § 5 is not reviewable and, when he failed within sixty (60) days after submission to interpose an objection to the South Carolina Senate reapportionment as provided in Act 1205, the State of South Carolina was automatically authorized to enforce it; subject to the right of any proper party or parties to assail the constitutional validity of that legislation in an appropriate action.[34]

In view of this holding, the District Court did not reach or decide the remaining issues raised by the parties.[35]

Appellants' subsequent motions to alter or amend the judgment and for an injunction pending this appeal were denied by the District Court on March 30, 1976. The appeal from the judgment of the District Court was docketed in this Court on April 28, 1976. The Court noted probable jurisdiction on December 6, 1976.

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[33] J. S. App. 14a.
[34] *Id.* 25a.
[35] The District Court did not purport to sit in appellate review of the *Harper II* decision, as is perhaps suggested by appellants' characterization of the holdings below. See Br. App. at 12 (first full paragraph). The District Court did not reach any questions as to the jurisdiction or authority of the *Harper II* District Court.

SUMMARY OF ARGUMENT

I

South Carolina is authorized by Section 5 of the Voting Rights Act to enforce its present Senate reapportionment plan. The State submitted the Senate Plan to the Attorney General for Section 5 preclearance promptly after it was enacted by the South Carolina General Assembly. The Attorney General deemed the submission to be complete on May 12, 1972, giving him sixty days from that date within which to object to the Plan under Section 5. The Attorney General did not object to the Plan within sixty days after May 12, 1972, thus rendering it fully enforceable by the State. *Allen v. State Board of Elections,* 393 U. S. 544 (1969).

II

The Attorney General's decision not to object to the Senate Plan within the sixty-day period is not reviewable under the Administrative Procedure Act (APA). The preclearance provisions of Section 5 were designed to provide a rapid method for rendering State voting laws enforceable. Review of the Attorney General's preclearance decisions would delay preclearance, thus defeating the purpose of the statutory scheme. Congress has for this very reason rejected proposals to amend Section 5 preclearance so as to bring it under the APA. Furthermore, Congress has provided that private parties may bring a traditional injunctive action against enforcement of a voting change if the Attorney General does not interpose objection under Section 5. This congressionally specified procedure is an adequate alternative to APA review and was intended by Congress to be exclusive. *Allen v. State Board of Elections, supra.*

Section 5 does not specify the standards or procedures to be applied by the Attorney General in reaching preclear-

ance decisions. *Georgia v. United States,* 411 U. S. 526 (1973). Thus, administrative preclearance is a matter committed to agency discretion by law. The Attorney General has no Section 5 duty to make a "reasoned decision on the merits" of each submitted change. Section 5 permits him to take no action on a submission within the sixty-day period. Therefore, the Attorney General's decision not to object to the Senate Plan cannot be reviewed on the ground that it was in breach of his Section 5 duty to make an independent determination on the merits of the Section 5 issue and to give a reasoned decision for not objecting, since no such duty is imposed by the statute.

To permit APA review of preclearance decisions would not only destroy preclearance as a rapid method for enforcing State laws, but would also expose the judgments of courts in traditional Fifteenth Amendment suits to a novel form of collateral attack. Rather than appealing from adverse judgments in such suits, plaintiffs could attempt to prevent enforcement of the challenged voting changes by seeking to force a Section 5 objection to the change through APA review. To permit APA review would also circumvent the congressional requirement that all suits involving questions under Section 5 be heard and determined by a court of three judges. *Allen v. State Board of Elections, supra.*

III

Assuming, *arguendo,* that the Attorney General's preclearance decisions are subject to judicial review, his decision not to object to the Senate Plan was a reasonable exercise of his discretion. The non-objection was based upon the Attorney General's decision to defer to the determination by a court acting within its jurisdiction that a submitted voting change did not violate the Fifteenth Amendment.

This procedure was noted and implicitly approved in *Georgia v. United States, supra.* Simply because the Attorney General could have reached his decision without regard to the *Harper I* court decision does not mean that it was unreasonable for him to consider it.

ARGUMENT

I

Section 5 of the Voting Rights Act provides that a State may enforce a voting change if the change has been submitted to the Attorney General and "the Attorney General has not interposed an objection within sixty days after such submission." Because the Attorney General did not interpose objection to the Senate Plan within sixty days after it was submitted to him, South Carolina may enforce the Plan.

This is a case of first impression in this Court.[1] Although it involves a question arising under Section 5 of the Voting Rights Act,[2] it is unlike previous Section 5 cases that have been decided here.[3] Prior cases involved challenges to the constitutionality of Section 5,[4] claims that a particular type of voting change was not covered by the statute,[5] or the substantive issue of whether a voting

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[1] In *State Board of Election Commissioners v. Evers,* 405 U. S. 1001 (1972), a similar question was presented on different facts. This Court dismissed the appeal for failure of the appellants to docket timely, so that the merits were not considered.

[2] 42 U. S. C., Section 1973c.

[3] The Court has decided questions arising under Section 5 in ten major cases: *South Carolina v. Katzenbach,* 383 U. S. 301 (1966); *Allen v. State Board of Elections,* 393 U. S. 544 (1969); *Hadnott v. Amos,* 394 U. S. 358 (1969); *Perkins v. Matthews,* 400 U. S. 379 (1971); *Connor v. Johnson,* 402 U. S. 690 (1971); *Georgia v. United States,* 411 U. S. 526 (1973); *Connor v. Waller,* 421 U. S. 656 (1975); *City of Richmond v. United States,* 422 U. S. 358 (1975); *East Carroll Parish School Board v. Marshall,* 424 U. S. 636 (1976); *Beer v. United States,* 425 U. S. 130 (1976).

[4] *South Carolina v. Katzenbach, supra; Georgia v. United States, supra.*

[5] *Allen v. State Board of Elections, supra; Hadnott v. Amos, supra; Perkins v. Matthews, supra; Connor v. Johnson, supra; Georgia v. United States, supra; Connor v. Waller, supra; East Carroll Parish School Board v. Marshall, supra.*

change was racially discriminatory.[6] None of those questions is presented by this appeal.

All parties to this action agree,[7] as did the District Court,[8] that the Senate Plan is covered by the Voting Rights Act and that compliance with Section 5 of the Act was a legal prerequisite to its enforcement. In this important respect this action differs from *Connor v. Waller,* 421 U. S. 656 (1975), cited and relied upon by appellants.[9] Unlike *Waller,* in which the District Court held that legislatively enacted reapportionment plans for both houses of the Mississippi legislature need not be submitted to the Attorney General, there was no pretension by South Carolina officials nor by the District Court in *Harper I* that Section 5 did not apply to the Senate Plan after it was enacted by the state legislature. There was no attempt to evade the Voting Rights Act by refusing to submit the Plan. The State took no steps to enforce the Plan before Section 5 preclearance was obtained. On the contrary, South Carolina scrupulously complied with the Voting Rights Act.[10] The question before this Court is not whether South Carolina has complied with Section 5, but whether, having complied fully, it is authorized by Section 5 to enforce its own legislation.

The Attorney General considered the submission of the Senate Plan to be complete under his guidelines on May 12, 1972. The Plan was precleared for enforcement by the Attorney General's letter of June 30, 1972, in which he stated:

[6] *City of Richmond v. United States, supra; Beer v. United States, supra.*

[7] See Br. App., 3, n.1.

[8] J. S., App. 2a.

[9] See Br. App. 11, 12, 21. See also Brief for the United States As Amicus Curiae, 8, n. 4; 10, n. 6 (hereinafter cited as "U. S. Juris. Br.").

[10] Appellants' insinuation that South Carolina's subsequent conduct is an "evasive tactic" designed to "deny minorities their voting rights" (Br. App., 19), should be viewed against the State's prompt, good faith compliance with Section 5. Of course, the assertion is also unsubstantiated by any evidence in the record.

"We enter no objection to the implementation of Plan A of Act No. 1205." No other action was taken by the Attorney General on or before July 11, 1972, the sixtieth calendar day after the submission.

In these circumstances, the language of Mr. Justice Blackmun's concurrence in *State Board of Election Commissioners v. Evers,* 405 U. S. 1001, 1003-4 (1972), could not be more in point:

> Section 5, it seems to me, plainly and clearly provides that if the procedure has been properly submitted to the Attorney General, as it was, "and the Attorney General has not interposed an objection within sixty days after such submission," as he did not, the proposed statutory changes "may be enforced" without the court proceeding in the District of Columbia and without resubmission to the Attorney General. Here the proposal was properly submitted to the Attorney General and he took no action by way of interposing an objection within the allowed 60 days. I do not see how the statute can be read or construed in any way other than to the effect that the conditions of its proviso were fulfilled and that the proposed new legislation was therefore enforceable subject, of course, to the statute's recognized exception as to any contest on the merits. I see nothing in *Perkins v. Matthews,* 400 U. S. 379, 385, (1971), which supports a contrary conclusion.

The same construction was given to Section 5 in *Vinik v. Smyth,* No. Civ. 71-89, TUC WEC (D. Ariz. Oct. 4, 1971).[11]

In that case, the plaintiffs sought an injunction against the enforcement of a State law providing for decennial cancellation of all voter registration. It was conceded that the change was subject to Section 5 and the claim for relief

[11] The case is unreported. The full text of the opinion is reproduced in Appendix C, *infra.*

was based on the allegation that the State had not obtained authority to enforce the change as required by Section 5. A unanimous three-judge court granted summary judgment:

> The submission was voluminous and detailed. It was received by the Department of Justice on July 12, 1971. If the sixty day period for Justice Department examination began on July 12, it would have expired on September 10, 1971. No evidence was introduced of any objection having been interposed to the legislative change in question, by the Attorney General of the United States at the hearing on September 30, 1971.
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> • • • •
>
> We hold that the Attorney General of Arizona complied with the provisions of Section 5 by his submission on July 8, 1971; that the 60 day period provided in Section 5 of the Voting Rights Act of 1965, terminated upon the expiration of 60 days from the receipt of the submission by the Attorney General of the United States, i. e., September 10, 1971; that the Attorney General of the United States has not interposed an objection within the 60 day period following submission, and therefore, the Arizona law . . . may be enforced.[12]

In *Allen v. State Board of Elections*,[13] this Court said of Section 5:

> It provides that a State may enforce a new enactment if the State submits the new provision to the Attorney General of the United States and, *within 60 days of the submission*, the Attorney General does not formally object to the new statute. . . . [Emphasis added.]

If, as Section 5 plainly states, the Attorney General's failure to take any action within sixty days would permit South Carolina to enforce the Senate Plan, it is difficult to see how his affirmative statement that he would not object to the

[12] Appendix C, *infra*, at 13a, 14a.
[13] 393 U. S. 544, 549 (1969).

Plan could jeopardize the State's authority to implement it. Yet it is precisely such an anomalous conclusion that the appellants invite this Court to reach.

II

The Attorney General's decision not to object to the Senate Plan within the sixty-day period is not subject to review under the Administrative Procedure Act.

The appellants' position that the Senate Plan was not precleared because of the Attorney General's objection on July 20, 1973, is defensible only if the decision in *Harper II* was valid. The *Harper II* court's suspension of the sixty-day requirement and its subsequent holding that an objection to the Senate Plan "is required by Section 5" prompted the Attorney General to reverse his previous decision not to interpose an objection. Without the order of the *Harper II* court the objection by the Attorney General, 434 days after submission, was of no effect. The central question, therefore, is whether the *Harper II* decision was correct. The *Harper II* opinion rests on the conclusion that the decisions of the Attorney General under Section 5 are subject to APA review. In its opinion below, the District Court in this case held that:

> . . . the determination made by the Attorney General under Section 5 is not reviewable and, when he failed within sixty (60) days after submission to interpose an objection to the South Carolina Senate reapportionment. . ., the State of South Carolina was automatically authorized to enforce it. . . .[14]

Because the question of APA reviewability is critical to the success of their action, appellants argued below that the principle of collateral estoppel prevented the appellees from raising the defense that the Attorney General's non-

[14] J. S. App., 25a.

objection was valid and unreviewable under the APA. Relying principally on two decisions of this Court, *Blonder-Tongue v. University Foundation,*[15] and the *Penn-Central Merger Cases,*[16] appellants asserted that *Harper II* foreclosed defendants from litigating the reviewability issue. The District Court's rejection of the collateral estoppel argument is well-reasoned and needs no repetition here.[17]

Having failed in their collateral estoppel argument below, appellants raise it only obliquely in this Court.[18] The main thrust of their argument here is not that the question of APA reviewability cannot be raised, but that it is irrelevant. The argument may be summarized as follows. Assuming that the *Harper II* court could not review the Attorney General's decision not to object to the Senate Plan, it nevertheless had independent authority to suspend the sixty-day requirement of Section 5 under the rule in *United States v. United Mine Workers,* 330 U. S. 258 (1947). Once the court suspended the sixty-day period, the Attorney General's objection, entered over a year later, was valid under Section 5.

This argument is erroneous for at least two reasons: (1) The *United Mine Workers* rule is a rule of criminal contempt, wholly inapplicable to the facts of this case. The rule states that a party to a lawsuit may not disobey a court

[15] 402 U. S. 313 (1971).
[16] 389 U. S. 486 (1968).
[17] See J. S. App., 5a-13a.
[18] See Br. App., 18-20. Interestingly, appellants' brief never mentions the collateral estoppel issue by name. A careful reader of their brief might not even be aware that *they* raised it below. Rather one is left with a vague impression that the suit below was an attempt by South Carolina to have *Harper II* overruled or an evasive tactic to deny minority voting rights. See n. 9, *supra.* Pursuing the collateral estoppel issue indirectly before this Court, appellants argue that South Carolina was not a "stranger to the judicial review proceedings in *Harper* to review the Attorney General's initial decision not to object." In a statement which smacks of Orwellian "newspeak," they claim "[i]t was South Carolina which initiated the legal proceedings" in *Harper II* by submitting the Senate Plan to the Attorney General for Section 5 preclearance. Br. App., 18. The sophistry of this argument is apparent.

order simply because he believes it is an invalid order. Appeal from the order, not disobedience, is the proper method to challenge its validity. If a party chooses to disobey the order, he may be punished for contempt of court. It is no defense to a contempt citation that the order disobeyed was invalid.[19] *United Mine Workers* does not foreclose a challenge to the validity of a court order in the context of proceedings other than criminal contempt for disobedience. (2) The *validity* of an order purporting to suspend the sixty-day period cannot be established by the *United Mine Workers* rule. That rule does not concern the validity of orders, but only the power of the courts to issue them. Unless the order in *Harper II* suspending the sixty-day period was correct as a matter of law, the Attorney General's objection is of no legal effect under Section 5.[20] The Court of Appeals in *Harper II* appreciated this point when it tied the validity of the suspension order to the question of APA reviewability.[21] Appellants have offered no other reason why the suspension order was valid. Therefore, it is essential to their case to establish that the Attorney General's nonobjection to the Senate Plan was reviewable under the APA. For the reasons that follow, however, APA review is not available for decisions made pursuant to Section 5 of the Voting Rights Act.

[19] Cf., *Walker v. City of Birmingham,* 388 U. S. 307 (1967).
[20] The soundness of this conclusion can be seen by considering two hypothetical questions. What would be the effect of the Attorney General's objection under Section 5, if the Court of Appeals in *Harper II* had reversed the suspension order of the District Court? What would be the effect of the Attorney General's objection under Section 5, if there had been no *Harper II* lawsuit and he had merely interposed objection *sua sponte?* Both hypotheticals illustrate that the Attorney General's authority to interpose objection more than a year after the submission was complete rests on the suspension order. If that order was erroneously entered then the Attorney General had no authority to interpose objection.
[21] See *Harper v. Levi, supra,* at 520 F. 2d 60-61. The United States in its *amicus* brief as to jurisdiction also points out that the *Mine Workers* case is inapplicable. See U. S. Juris. Br., 19, n. 10.

Speaking to the preclearance requirements of the Voting Rights Act in *Allen v. State Board of Elections,* this Court stated:

> Once the State has successfully complied with the Section 5 approval requirements, private parties may enjoin the enforcement of the new enactment *only* in traditional suits attacking its constitutionality; *there is no further remedy provided by Section 5.*[22]

As this language suggests, Section 5 left open only one course of action to appellants after the Attorney General entered no objection to the Senate Plan. That course of action was not review of the Attorney General's decision under the APA, but an injunctive suit attacking the constitutionality of the Plan.[23]

Under the express terms of the APA, agency action is not subject to review in three situations:

> (1) where the statute authorizing agency action precludes judicial review;[24]
>
> (2) where there is other adequate remedy in the courts;[25] and
>
> (3) where agency action is committed to agency discretion by law.[26]

The Attorney General's preclearance decisions under Section 5 fall within all three exceptions to APA review.

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[22] 393 U. S. 544, 549-50 (1969) (emphasis added).

[23] Appellants were not precluded from bringing a traditional suit by the decision in *Harper I.* In its Order of June 9, 1972, the *Harper I* court specifically stated:

> Any party seeking to challenge Plan A may, of course, bring an action seeking further relief. If such a party can prove Plan A constitutionally infirm based on facts not previously presented to this Court, relief would not be barred by the doctrine of *res judicata.*

[24] 5 U. S. C. Section 701(a) (1).

[25] 5 U. S. C. Section 704.

[26] 5 U. S. C. Section 701(a) (2).

A

Congress's intent to preclude review is fairly discernible from the statutory scheme and legislative history of Section 5.

Turning to the first exception,[27] a reading of Section 5 shows that it is silent on preclusion of judicial review. In such circumstances the applicable rule is that "judicial review . . . will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories v. Gardner,* 387 U. S. 136, 140 (1967). The rule has also been stated as follows: "There is no presumption against judicial review . . . unless that purpose is fairly discernible in the statutory scheme." *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U. S. 150, 157 (1970). In determining whether Congress intended to preclude judicial review, courts look to the pattern and purpose of the statutory scheme and to the legislative history of the statute. *Switchmen's Union of North America v. National Mediation Board,* 320 U. S. 297 (1943).[28]

Applying these rules in the instant case, the District Court reviewed the purpose and history of Section 5 and concluded:

> There were not simply "persuasive" but compelling reasons to believe nonreviewability of that action "was the purpose of Congress."[29]

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[27] The second and third exceptions are discussed below under argument headings B. and C., respectively.

[28] Cited with approval in *Brotherhood of Railway and Steamship Clerks v. Employees Association,* 380 U. S. 650, 659-60 (1965), and *Association of Data Processing Service Organizations, Inc. v. Camp, supra,* at 157.

[29] J. S. App., 14a.

(1) Judicial review of administrative preclearance decisions would defeat the purpose of Congress to provide an expeditious means by which the State can obtain authority to enforce voting changes.

As originally proposed by the Johnson Administration and considered by the Judiciary Committees of the House and Senate, the Voting Rights Act did not contain any provision for submission of voting changes to the Attorney General.[30] Section 8 of the original bill provided only for a declaratory judgment action in the District Court of the District of Columbia.[31] Several members of the House expressed concern at the undue delay this procedure would cause in the implementation of State voting changes:

> The District Court for the District of Columbia already has a huge backlog of over 4,000 civil cases. With the median time of 28 months required from the time of filing an action in this court to the disposition after trial, this provision of the committee-Celler bill will contribute to a long delay in the hearing of such cases. In the meantime, State voter qualifications and standards are suspended without relief. If such drastic effects must be visited upon the States involved, resolution of this class of cases should be handled expeditiously.[32]

Similar concern about the burden placed on the States by having to litigate in the District of Columbia was expressed during the Senate Judiciary Committee hearings.[33]

[30] The briefs on appeal in *Harper II* do not mention most of the legislative history which will be discussed here. Apparently the Court of Appeals thought that the testimony of Attorney General Katzenbach quoted in the following paragraph was the only "morsel of legislative history" on the question of nonreviewability. See *Harper v. Levi*, at 520 F. 2d 65. One may speculate that the Court of Appeals would have reached a different conclusion on nonreviewability if it had been fully apprised of the legislative history of Section 5.

[31] *Id.*

[32] H. R. Rep. No. 439, 89th Cong., 1st Sess., 38 (1965) (footnotes omitted).

[33] See *e. g., Hearings on S. 1564 Before the Senate Committee on the Judiciary*, 89th Cong., 1st Sess., pt. 1, 69-73 (1965).

Recognizing that the requirement of a declaratory judgment for every voting change was an unduly burdensome intrusion upon State sovereignty and that it would be desirable to include some procedure for rapid clearance of voting changes, Attorney General Katzenbach suggested the possibility of permitting the States to submit voting changes to the Attorney General and permitting the changes to be enforced if there was no objection to them within a given period of time:

> Senator ERVIN. It seems to me that is a drastic power which can hardly be reconciled with the federal system of government, if we still have a federal system of government.
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> Attorney General KATZENBACH. I think it is quite a strong power, Senator. The effort is to prevent this constant slowing down process which occurs when States enact new laws that may clearly be in violation of the 15th Amendment, but you have to go through the process of getting judicial determinations of that. It takes a long time. In the interval the purposes of the act are frustrated.
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> Now, there may be better ways of accomplishing this. I do not know if there are. There are some here I can imagine, a good many provisions of State law, that could be changed that would not in any way abridge or deny the right; and we, perhaps, except for the fact that some members of the committee, I think, including yourself, have had difficulty with giving the Attorney General discretion on some of these things—perhaps this could be improved by applying it only to those laws which the Attorney General takes exception to within a given period of time. Perhaps that would remove some of the burdens.[34]

In accordance with this suggestion, the Committee amended the bill to provide for administrative preclearance within

[34] *Id.*, at 237.

sixty days. This provision was, of course, adopted by the Congress and is now an integral part of Section 5.

The legislative history of the 1975 extension of the Voting Rights Act reveals that this congressional purpose remains unchanged today. Administrative preclearance under Section 5 was the focus of considerable discussion and debate in 1975.[35] The remarks of Congressman Andrew Young, a proponent of extending Section 5 preclearance, are representative of statements throughout the record urging retention of administrative preclearance as an expeditious method of rendering voting changes enforceable under the Act:

> Opponents of the Voting Rights Act . . . have claimed that preclearance is burdensome, time-consuming, and expensive. They assert that most voting changes are "minor" or "technical." But the preclearance procedure clearly is more efficient than case-by-case lawsuits. The Attorney General is supposed to act on preclearance submissions within 60 days.[36]

Finally, it should be noted that Congress specifically amended Section 5 in 1975 to provide for expedited consideration of voting changes within the sixty-day period.[37] This amendment is further evidence that Congress intended administrative preclearance to be free from unnecessary delays so that voting changes could be promptly implemented by the submitting State.

The effect of judicial review of the Attorney General's Section 5 decisions would be to nullify a statutory scheme carefully designed to avoid the delays and burdens of litigation. Review would result in uncertainty as to the validity of State laws years after their enactment, would

[35] See *e. g.*, 121 CONG. REC. H4721 (Daily ed. June 2, 1975) (Mr. Edwards); *Id.*, H4745 (Ms. Jordan); *Id.*, 4724-25 (Mr. Butler).
[36] 121 CONG. REC. H4708 (Daily ed. June 2, 1975).
[37] See Section 406, P. L. 94-73, 89 STAT. 404-405 (1975); S. Rep. No. 295, 94th Cong., 1st Sess., 43 (1975).

unnecessarily consume the judicial resources of several courts and would needlessly disrupt the orderly processes of State government. Indeed, as the District Court below observed, the best illustration of this point is the record in this case:

> The delays that would follow, if judicial review of the Attorney General's determination were found to exist, are well illustrated by the record in *Harper,* which involved no real factual review but concerned only an issue of law. The action was begun in the District Court in August, 1972, but the District Court, though the parties submitted the case on an agreed statement of facts, did not decide it until the middle of May, 1973, almost ten months later. The appeal from that decision was not heard until September, 1974, and the opinion of the Court of Appeals was not filed until the end of July, 1975. In other words, the right of the State to enforce its legislation, if Section 5 is to be construed as plaintiffs contend and as *Harper* held, would have been delayed from May 2, 1972, to end of July, 1975, a period of over three years. It was this very delay, so graphically demonstrated by the record in this case which Congress, by providing for Attorney General clearance, sought to avoid.[38]

The relationship between the purpose of providing rapid preclearance and excluding other judicial remedies was also recognized by this Court in *Allen*:

[38] J. S. App. 22a, n. 28. See also *Harris v. Levi,* 416 F. Supp. 211, 215 (D. D. C. 1976) (footnote omitted):
In addition to conflicting with Congress' intent to allow rapid approval of nondiscriminatory voting reforms, judicial review of a decision by the Attorney General not to object to a voting statute is illogical. Should the reviewing tribunal find that the Attorney General's decision is not supported by the administrative record, the state could then seek further review from a three-judge panel, since section five authorizes this means of review whenever the Attorney General interposes an objection to a voting statute. Not only does this procedure involve a tremendous waste of judicial resources, but it forces the Attorney General to defend a suit he does not believe in.

> . . . Section 5 does not necessitate that a covered State obtain a declaratory judgment action before it can enforce any change in its election laws. It provides that a State may enforce a new enactment if the State submits the new provision to the Attorney General. . . and, within 60 days of the submission, the Attorney General does not formally object to the new statute or regulation. • • • • [T]he State is not required to first submit the new enactment to the Attorney General as it may go directly to the District Court for the District of Columbia. The provision for submission to the Attorney General merely gives the covered State *a rapid method of rendering a new state election law enforceable.* Once the State has successfully complied with the Section 5 approval requirements, private parties may enjoin the enforcement of the new enactment only in traditional suits attacking its constitutionality; there is no further remedy provided by Section 5.[39]

Thus, the intent of Congress to preclude judicial review is "fairly discernible in the statutory scheme." *Association of Data Processing Service Organizations, Inc. v. Camp, supra.*

> (2) **Congress has deliberately rejected alternative methods of preclearance that would have included APA review of the Attorney General's decisions, thus indicating that review is intended to be precluded.**

After the extension of the Voting Rights Act in 1970 the focus of congressional concern shifted from provisions primarily concerned with voter registration to Section 5 enforcement. This Court's decision in *Allen* had been followed by a marked increase in Section 5 submissions to the Attorney General and differing views had arisen as to what legal standard the Attorney General should apply in

[39] 393 U. S. 549-50.

reviewing them.[40] In May and June of 1971 the House Judiciary Committee conducted hearings on the enforcement of the Voting Rights Act during which the guidelines subsequently promulgated in 28 C. F. R., Section 51, *et seq.*, were extensively discussed. During these hearings the Attorney General proposed an amendment to Section 5 which would have brought the administrative preclearance scheme of the statute under the Administrative Procedure Act. The proposal was described by the Assistant Attorney General of the Civil Rights Division in his testimony before the Committee:

> We have felt the need, and the Attorney General has discussed it with me, for a proposal to the Congress to amend section 5, by making it possible in complex, complicated fact cases to have a hearing examiner, much as other agencies have, for the purpose of hearing evidence presented by all persons that are interested and that have evidence, for the purpose of making findings and tentative decisions and recommendations, and to proceed in the manner provided under the Administrative Procedure Act.
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> • • • •
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> . . . the Department of Justice is now developing a proposal to amend section 5 of the Voting Rights Act in order to provide for a full-scale adminstrative hearing under a hearing examiner when it is determined that a submission involves complex issues of fact. The final determination in such a case would be subject to judicial review in a court of appeals. We believe that such an amendmnet would faciliate proper evaluation by the Attorney General of voting changes, such as reapportionments and annexations, which require ex-

[40] See Statement of Joseph L. Rauh, Jr., *Hearings on the Enforcement of the Voting Rights Act Before the Civil Rights Oversight Committee of the House Judiciary Committee*, 92d Cong., 1st Sess., Ser. No. 8 at 114-115 (1971).

amination of complicated and often extensive demographic information.[41]

Congress declined to implement this very specific proposal for judicial review of the Attorney General's preclearance determinations, preferring instead to retain the original scheme of rapid administrative preclearance without foreclosing traditional suits for Fifteenth Amendment relief in the ordinary courts. When the Voting Rights Act was extended by Congress in 1975, Section 5 was re-enacted without amendment to the system of administrative preclearance. If Congress had desired to alter its previously devised scheme to permit judicial review under the Administrative Procedure Act, it clearly could have done so at that time. Thus, there is "persuasive reason to believe" that the purpose of Congress was to preclude such review.

The legislative history of Section 5 is all but ignored by appellants.[42] Instead they rely on *Dunlop v. Bachowski*[43]

[41] *Hearings on the Enforcement of the Voting Rights Act Before the Civil Rights Oversight Committee of the House Judiciary Committee*, 92d Cong., 1st Sess., Ser. No. 8, at 7, 6 (1971).

[42] The United States in its *amicus* brief as to jurisdiction likewise gives scant attention to legislative history, devoting only one paragraph to the subject. See U. S. Juris. Brief, 17 (first full paragraph).

Appellants do state that Congress was aware of the ruling in *Harper v. Levi* when it extended the Voting Rights Act in 1975. Br. App., 22, n. 28. The passages cited, however, have nothing to do with APA reviewability. The first citation is to a portion of the Senate Judiciary Committee Report on extension of the Voting Rights Act. S. Rep. No. 295, 94th Cong., 1st Sess., 18 (1975). The paragraph in question is a discussion of this Court's decision in *Connor v. Waller*, 421 U. S. 656 (1975). *Harper v. Kleindienst* is cited without comment as a footnote to the following sentence: "The [Supreme] Court [in *Connor v. Waller*] also ruled that the federal courts should not inquire into fourteenth and fifteenth amendment questions until all Section 5 questions had been determined." Since *Harper v. Kleindienst* does not stand for the quoted proposition (the question was not even raised in that suit), the extent of congressional "awareness" of the case is questionable. In any event, the bill reported out by the Senate Committee was not considered by either the Senate or the House and the floor debates make it clear that the Senate Report was not even printed at the time the Senate took up consideration of the House bill. See 121 CONG. REC. S13335, 13341, 13342 (Daily ed. July 22, 1975); *Id.*, S13618, 13621 (Daily ed. July 24, 1975) (Sen. Morgan). *(cont.)*

to support their argument that Congress did not intend to preclude APA review. As the District Court pointed out,[44] *Bachowski* does not support appellants' position, but undermines it. The statute in *Bachowski*, the LMRDA,[45] forbade private parties from resorting to the courts to challenge the validity of a union election. Thus *Bachowski* represents a textbook example of "agency action for which there is no other adequate remedy in a court."[46] As will be argued below,[47] Section 5 presents a very different picture. More to the point here is the obvious difference betwen the legislative history of the LMRDA and that of Section 5, outlined above. Upon examining the materials that the Secretary of Labor relied upon to claim a con-

[42] *(cont.)* Appellants' second citation is to a remark made by Rep. Edwards after the House version of the bill had passed the Senate. The issue before the House was whether to agree to a Senate amendment reducing the extension of the Voting Rights Act from ten to seven years and certain other amendments. Again the cited passage has nothing to do with APA review, which was not the question before the House and was not mentioned by Rep. Edwards:

> A 7-year extension is far from an ideal situation, but it can be lived with. And rather than endanger the life of the act itself, I believe that live with it, we must.
>
> Although I have not been able to obtain a copy of the decision, I should like to note, somewhat as an aside, how pleased I was to hear that only a few days ago the District of Columbia Court of Appeals had upheld the lower court's decision in Harper against Kleindienst. In that case the Justice Department had refrained from subjecting a South Carolina State Senate redistricting plan to section 5 or pre-clearance scrutiny because the local South Carolina District Court has approved the plan. The U. S. District Court for the District of Columbia found that the Attorney General had acted improperly and ordered him to make a "reasoned decision" on the Senate plans. It was that district court decision that was recently upheld and in so doing the court of appeals has again underscored the importance of having the system of section 5 review—whether it be carried out by the Attorney General or the U. S. District Court for the District of Columbia.

122 CONG. REC. H7631 (Daily ed. July 28, 1975) Since Congress amended Section 5 to make more explicit than before the Attorney General's right to take no action within the sixty-day period, it seems, if anything, to have disagreed with the *Harper* decision, which held that he has a statutory responsibility to make a "reasoned decision" on Section 5 submissions. See *infra*,

[43] 421 U. S. 560 (1975).

[44] J. S. App., 18a-19a.

[45] 29 U. S. C., Section 483.

[46] 5 U. S. C., Section 704.

[47] *Infra*, 30-33.

gressional purpose to preclude judicial review, this Court stated in *Bachowski*:

> They do not reveal to us any congressional purpose to prohibit judicial review. Indeed there is not even the slightest intimation that Congress gave thought to the matter of the preclusion of judicial review. [48]

This is in clear contrast to the legislative history of Section 5 in which provisions for judicial review of the determinations of the Attorney General were both considered and rejected.

B

Congress, in Section 5, specifically provided for de novo judicial proceedings as an "adequate remedy in a court" for parties who do not agree with the Attorney General's preclearance decisions.

In contrast to the LMRDA, which was at issue in *Bachowski,* Section 5 expressly provides a method whereby any party disagreeing with the Attorney General's preclearance decisions may seek relief in the courts. As this Court explained in *Allen*:

> If the Attorney General objects to the new enactment, the State may still enforce the legislation upon securing a declaratory judgment in the District Court for the District of Columbia.
>
> * * * * * * *
>
> Once the State has successfully complied with the Section 5 approval requirements, private parties may enjoin the enforcement of the new enactment . . . in traditional suits attacking its constitutionality. . . . [49]

The legislative history of Section 5 discloses that the provision allowing private parties to litigate the validity of a voting change that has been successfully precleared was not originally part of the Voting Rights Act as proposed by the House, but was added in the Conference Committee on the bill.[50] The House managers of the bill recommended adoption of this change.[51] Of course, Congress could have provided that the Attorney General's determination was conclusive of the rights of private parties and was the exclusive remedy under Section 5. Or Congress could have provided for some form of direct judicial review of the Attorney General's decisions not to object to State voting changes. But Congress chose neither of these alternatives. Instead, it provided for private parties to bring injunctive suits against the voting change directly, if they disagreed with the Attorney General's nonobjection.

The general rule applied in such circumstances is that the judicial forum prescribed by Congress is exclusive and other avenues of judicial review are not available.[52] This rule applies to preclude APA review of administrative action in cases where a *de novo* legal action may be instituted by a private party pursuant to statute.[53] The rule merely gives effect to the plain language of the APA which speaks of "final agency action for which there is no other adequate remedy in a court." [54]

Appellants do not quarrel with the stated principle. Instead they argue that the remedy of a traditional injunctive suit is "inadequate." [55] In support of their argument

[48] 421 U. S. 567.
[49] 393 U. S. 549-50.

[50] H. R. Rep. No. 711, 89th Cong., 1st Sess., 11 (1965).
[51] *Id.*
[52] *Whitney National Bank v. Bank of New Orleans and Trust Company*, 379 U. S. 411, 420-422 (1965); *Weahkee v. Powell*, 532 F. 2d 727, 729 (10th Cir. 1976); *E. I. duPont deNemours and Co. v. Train*, 528 F. 2d 1136, 1142 (4th Cir. 1975) cert. granted, 425 U. S. 933 (1976); *UMC Industries, Inc. v. Seaborg*, 439 F. 2d 953, 955 (9th Cir. 1971).
[53] *Weahkee v. Powell, supra; Klein v. Commissioner of Patents of United States*, 474 F. 2d 821, 824 (4th Cir. 1973); *UMC Industries, Inc., v. Seaborg, supra; Vogel v. Gottschalk*, 350 F. Supp. 865 (E. D. Va. 1972).
[54] 5 U. S. C. Section 704.
[55] Br. App. 28-31. The United States makes the same argument in its *amicus* brief. U. S. Juris. Br. 13-16.

appellants cite an impressive array of legislative and judicial authorities concerning the "inadequacy" of traditional injunctive suits to vindicate minority voting rights. However, the argument confuses the adequacy of private injunctive suits *standing alone* (the situation referred to in appellants' cited authorities) with the adequacy of such suits *as part of the Section 5 scheme* which also includes preclearance of voting changes (the situation in question here). Because covered jurisdictions know that all new voting procedures must be approved either by the Attorney General or by a declaratory judgment of the District Court for the District of Columbia, the incentives for subterfuge and evasion which existed prior to the 1965 Act have have largely been removed.[56] The very fact that voting changes may not be enforced without preclearance does away with the possibility of evading court decisions rendered in traditional injunctive suits through the use of new discriminatory devices. It was this opportunity for continual evasion—now foreclosed by Section 5—that made traditional suits, standing alone, an inadequate remedy.[57]

[56] It is a matter of public record that the vast majority of voting changes which have been submitted under Section 5 have been precleared even under the stringent standards applied by the Attorney General in his guidelines. Out of a total of 4,476 changes submitted from 1965 through 1974 only 163 were objected to by the Attorney General. In that period South Carolina submitted 941 changes of which only 19 were objected to. See *Hearings on H. R. 939 . . . Before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee*, 94th Cong., 1st Sess., Ser. No. 1, pt. 1, 169 (1975).

[57] In testimony before Congress on extension of the Voting Rights Act the Assistant Attorney General for the Civil Rights Division stated:

> . . . the act has been unusually effective. It brought about a prompt, visible, dramatic increase in political participation by the black citizens in the South whose prior exclusion from the political process it was primarily designed to remedy. The results have fortunately been a general acceptance in the covered States of the resulting franchise of blacks, with important exceptions, of course, that require the continuing attention which extension would afford.

Statement of J. Stanley Pottinger, *Hearings on H. R. 939 . . . Before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee*, 94th Cong., 1st Sess., Ser. No. 1, pt. 1, 280 (1975).

In Section 5 Congress specifically provided that:

> [N]either an affirmative indication by the Attorney General that no objection will be made nor the Attorney General's failure to object . . . shall bar a subsequent action to enjoin enforcement of such qualifications, prerequisites, standards, practices, or procedures.

This language clearly indicates that Congress foresaw that there would be situations in which private citizens might disagree with the Attorney General's decision and wish to seek relief from its consequences. If it was the judgment of Congress that such suits were of little value or that the remedy provided thereby was inadequate, there would have been no reason for Congress specifically to provide for such suits. Moreover, it is not necessary to conclude that the Attorney General's decision not to act on a voting change is without consequence, in order to reason that, regardless of his decision or its consequences, the citizen who wishes to challenge the change has an adequate remedy in the courts. Congress did not agree with appellants that such suits would not provide an adequate remedy; and where Congress has expressed its judgment by expressly providing a particular judicial proceeding, the adequacy of the procedure specified need not be inquired into further.[58]

[58] *Cf. Switchmen's Union of North America v. National Meditation Board*, 320 U. S. 297, 301 (1943).

C

Congress committed preclearance decisions to agency discretion by authorizing the Attorney General to establish his own standards for preclearance review and by authorizing him to make no response within the sixty-day period.

The administrative preclearance provisions of Section 5 represent the method by which Congress chose to balance what it considered to be competing constitutional interests in the area of voting procedures and qualifications. On the one hand, the national legislature felt that federal scrutiny of State voting changes was necessary to make the guarantees of the Fifteenth Amendment a reality for black voters in covered jurisdictions. On the other hand, federal scrutiny has been recognized by Congress and this Court to be a serious distortion of the federal structure of the Constitution and a grave intrusion into legitimate areas of State power.[59] Administrative preclearance was thus formulated as a means of minimizing the degree of interference with the State legislative process while at the same time providing adequate safeguards against abridgement of the franchise on account of race.

The success of this carefully devised scheme requires, by its very nature, a flexible exercise of administrative discretion if these competing interests are to be balanced as Congress intended. Voting changes may vary from the most trivial, such as changes from paper ballots to voting machines,[60] to the most complex, such as annexations and redistrictings.[61] The fact that the Attorney General must

[59] See, *e. g.*, *Allen v. State Board of Elections*, at 393 U. S. 562-63; *Georgia v. United States*, 411 U. S. 526, 543 (1973) (White, J., dissenting); 121 Cong. Rec. S13613 (Daily ed., July 22, 1975) (Sen. McClure); *Id.*, H4810 (Daily ed., June 3, 1975) (Mr. McClory).

[60] See, *e. g.*, *Perkins v. Matthews*, 400 U. S. 379, 387-388 (1971).

[61] See, *e. g.*, *City of Richmond v. United States*, 422 U. S. 358 (1975); *Beer v. United States*, 425 U. S. 130 (1976).

consider changes of enormously varying impact and complexity in itself argues that Congress intended to invest him with wide discretion under Section 5.

APA review of the Attorney General's actions would interfere considerably with his effectiveness in performing his Section 5 functions. If a disgruntled party could take the Attorney General to court and disagree with him—as the *Harper II* plaintiffs did—on such questions as when the sixty-day period begins to run, whether he can consider certain matters (*i.e.*, court decisions) in reaching his own decision not to object, or whether he has applied a proper standard of decision making (*i.e.*, deference), then quite obviously the Attorney General's ability to perform his Section 5 functions would be impaired.[62] Additionally,

[62] This point was made quite forcefully during the 1975 hearings in the context of a discussion about the appointment of federal examiners in covered jurisdictions.

> Mr. POTTINGER. * * * If we are in a position of being appealed under these special provisions, admittedly designed to have the Justice Department act promptly, in those areas where there are disputed facts, then we will no longer be able to act promptly. Regardless of administration, regardless of general policy, in the workings of the bureaucracy where we administer this tool, the result will inevitably be a slowdown as we begin writing opinions, looking over our shoulder to appellate court decisions, and arguing such decisions.
>
> Mr. BADILLO. Most agencies are subject to review by courts. If we use that theory then we would abolish all—
>
> Mr. POTTINGER. No, these are unique to the Federal Government in any regard one looks at them. There is no other Federal legislation to my knowledge in the history of the Republic that approaches these special provisions in their content. All others have review. If you wish to make these subjects to the same review, then I would bring to your attention that an executive agency's review brings bureaucracy to a grinding halt. It may be where such an agency has made a mistake it would be to the benefit of that agency and the act.
>
> I am suggesting you look at it very carefully before allowing such appeals, because I think it would hamstring us.

Hearings on H. R. 939 . . . Before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, 94th Cong., 1st Sess., Ser. 1, pt. 1, 300 (1975).

as the District Court below recognized, if private parties can litigate these matters, so can submitting authorities.[63] Judicial review would thus defeat the State's ability to obtain expeditious enforcement of its law on the one side and nullify the safeguard of federal preclearance on the other. A further adverse impact on agency effectiveness would result from the fact that "[c]lose judicial scrutiny inevitably leads to more formalized decision-making."[64] Although both voters and submitting authorities might find this desirable in a few cases, it would be unnecessary, inappropriate, and disruptive in the vast majority, especially since the Attorney General must consider hundreds of changes each year.

Another factor to be considered is that Congress chose not to prescribe, even in a general way, the standards and procedures to be followed in reaching a decision to object or not to object. The proviso of Section 5 (which we set forth in the margin[65]) is completely silent in this regard.[66]

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[63] J. S. App. 24a. In *Robinson v. Pottinger*, 376 F. Supp. 615 (M. D. Ala. 1974), an action was brought by the submitting authority against the Attorney General under the APA. The assertion of the United States (U. S. Juris. Br. 18) that "covered jurisdictions cannot obtain [APA] review of the Attorney General's determination" begs the question rather than responding to it. The further statement that "[p]erfect symmetry in judicial review proceedings is not required, so long as the substantial rights of all parties may be asserted in a judicial forum" (*Id.*) cuts against the Government's position, since private parties may assert their substantive rights in a judicial forum by bringing a Fifteenth Amendment injunctive action.

[64] *Hahn v. Gottlieb*, 430 F. 2d 1243, 1250 (1st Cir. 1970). *Hahn* contains a good discussion of the "committed to agency discretion" concept. See also Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367 (1968).

[65] *Provided*, That such qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the At- *(cont.)*

In *Georgia v. United States*,[67] this Court pointed out the absence of statutory guidelines to govern administrative preclearance decisions under Section 5. Faced in *Georgia* with a challenge to the Attorney General's authority to promulgate certain standards and procedures for preclearance review, the Court sustained the Attorney General, placing considerable emphasis on the fact that such matters were committed to his discretion by Congress.[68]

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[65] *(cont.)* torney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submmission, the Attorney General may reserve the right to reexammine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of Section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

[66] The contrast to *Citizens to Preserve Overton Park v. Volpe*, 401 U. S. 402 (1971), on which appellants rely (Br. App. 25), is quite clear. In *Overton Park* the applicable statutes stated that the Secretary of Transportation was not to approve a project that required the use of public parkland unless no feasible alternatives existed. Thus, as this Court recognized, there was "law to apply." 401 U. S. 411-413. Here there is no statute stating that the Attorney General may not consider the ruling of a federal court in deciding whether or not to object to a submitted voting change.

[67] 411 U. S. 526 (1973).

[68] The Court noted that Section 5 "is also silent as to the procedures the Attorney General is to employ in deciding whether or not to object to state submissions, as to the standards governing the contents of those submissions, and as to the meaning of the 60-day time period in which the Attorney General is to object, if at all." 411 U. S. at 536. The Court also recognized that the legal standards of review which the Attorney General was to apply were not specified in the Act and was, therefore, a matter committed to his discretion: "It is not necessary to hold that this allocation of the burden of proof by the Attorney General was his only possible choice under the Act, in order to find it a reasonable means of administering his Section 5 obligation." *Id.* at 538. Observing that "[t]he judgment that the Attorney General must make is a difficult and complex one," the Court also sustained the Attorney General's discretion in determining when a submission was complete, so that the 60-day period of the Act would begin to run. *Id.* at 540-41. That the Court's opinion implied a broad agency discretion was also perceived by the dissenting Justices. See Opinion of White, J., at 411 U. S. 543.

Appellants argue that *Georgia* is itself an example of judicial review of an Attorney General's action under Section 5 (Br. App. 27-28). This argument fails to recognize that the claim being made by the State of Georgia was that the Attorney General had no *authority* under Section 5 either to promulgate the administrative guidelines or otherwise to decide what burden of proof must be met, what constituted a *(cont.)*

It is also significant that Congress gave the Attorney General the option of simply failing to respond to a submission within the sixty-day period.[69] This point was recognized by Judge MacKinnon in dissent in *Harper v. Levi*:

> Surely no one would contend that if the Attorney General took no action whatsoever, as is clearly authorized by the statute, that inaction could be subject to judicial review under the APA. It is hard to imagine a clearer instance of a matter "committed to agency discretion by law." [70]

The lower federal courts have generally held that the Attorney General's preclearance decisions are not subject

[68] *(cont.)* submmission, or when the sixty-day period would run. The Court upheld the Attorney General's authority to establish the guidelines. This was not "judicial review" in the sense contended for by appellants in the present case nor does it establish that Attorney General preclearance does not come within the "committed to agency discretion" exception of the APA. It is widely recognized that courts may determine whether an official is acting beyond the scope of his statutory authority even in those cases where they cannot review the manner in which he exercises his authority. See *Addison v. Holly Hill Fruit Products Inc.*, 322 U. S. 607 (1944); *Brotherhood of Locomotive Engineers v. Denver and Rio Grande Western R.R. Co.*, 290 F. Supp. 612, 618 (D. Colo. 1968), aff'd., 411 F. 2d 1115, 1117 (10th Cir. 1969). There is, of course, no question that the Attorney General has authority to indicate that he will not interpose objection to a voting change.

[69] The 1975 amendments to Section 5 make even clearer than the original text of the statute that the Attorney General may take no action within the sixty days. Originally Section 5 spoke only of the Attorney General's "failure to object." See P. L. 89-110, 79 STAT. 439 (1965).

As amended, the statute now refers both to "an affirmative indication by the Attorney General that no objection will be made" and to "the Attorney General's failure to object." See J. S. App. 58a. Evidence placed before the House Judiciary Committee during the 1975 hearings also draws a clear distinction between taking no action and not objecting:

> Until the 60 days have passed the new practice or procedure cannot be implemented by the submitting jurisdiction. If the 60 days pass and the attorney general has taken no action or has not objected, the change can be put into effect.

Hearings on H. R. 939 . . . Before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, 94th Cong., 1st Sess., Ser. No. 1, pt. 2, 1523 (1975). The Chief of the Justice Department's Voting Section confirmed that this was a "correct statement of the general practice of the voting section in administering Section 5." See A. 39-41.

[70] 520 F. 2d at 73.

to judicial review, which further suggests that such decisions are committed to agency discretion by law. In *Common Cause v. Mitchell*,[71] the District Court for the District of Columbia was faced with a challenge to the Attorney General's failure to object to an Arizona statute providing for a statewide purge of voter registration lists and reregistration of voters. The Attorney General had initially taken the position that the State of Arizona was not required to submit the change, since the whole State is not covered by Section 5.[72] The change was subsequently submitted, however, and the Attorney General did not interpose objection. The plaintiffs' basic contention was similar to that made in *Harper II*, that the Attorney General had improperly considered the evidence before him in reaching the decision not to object. The District Court dismissed the action, holding that:

> . . . 42 U. S. C. § 1973c [Section 5] does not require the Attorney General of the United States to make determinations that are subject to the adjudicative and judicial review provisions of the Administrative Procedure Act.

In *United States v. Cohan*,[73] the court was faced with the question of "whether or not there was valid federal scrutiny of the submitted voting change" when the Attorney General's determination was "unsupported by reasons or reasoning and without any explicit finding of any racially discriminatory effect of the new voting procedure." [74] Again the issue was similar to that in *Harper II*: "whether the Attorney General has fulfilled his duties under Section 5 of the Voting Rights Act" in light of the claim "that the

[71] Civil Action No. 2348-71 (D. D. C. Mar. 20, 1972) (unreported).

[72] See Testimony of James P. Turner, *Hearings on the Enforcement of the Voting Rights Act Before the Civil Rights Oversight Committee of the House Judiciary Committee*, 92d Cong., 1st Sess., Ser. 8 at 56 (1971).

[73] 358 F. Supp. 1217 (S. D. Ga. 1973) (3-judge court).

[74] *Id.* at 1219.

Attorney General failed to make a Section 5 determination as to whether Plan A of Act 1205 has the purpose or effect of denying or abridging the right to vote on account of race or color. . . ." [75] Citing this Court's opinion in *Georgia*, the *Cohan* court unanimously agreed that the Attorney General's decision was a matter within his discretion and constituted valid federal scrutiny, although it was not a reasoned decision based on explicit findings.

In *Griffith v. United States*,[76] the same district judge who decided *Harper II* dismissed an action seeking review of the Attorney General's decision to object to voting changes in Kings County, New York. This result was approved by the Court of Appeals for the Second Circuit in *United Jewish Organizations of Williamsburgh v. Wilson*.[77] The Court of Appeals in *Williamsburgh* upheld the lower court's dismissal of the complaint against the Attorney General in that case on the ground that

> [T]he court below does not, however, have jurisdiction to "review" the Attorney General's determination of April 1, 1974, disapproving the 1972 Act, that jurisdiction being vested exclusively in the District Court for the District of Columbia. . . .[78]

In dictum the court went on to say:

> Appellants do not urge that a Voting Rights Act determination of the Attorney General is reviewable under the Administrative Procedure Act, probably because they concede it to be "committed to agency discretion by law." 5 U. S. C. § 701 (a) (2). Analogous determinations under § 407 of the Civil Rights Act of 1964, 42 U. S. C. § 2000c-6, have been held not subject to judicial review. *United States v. Greenwood Municipal Separate School Districts*, 406 F. 2d 1086 (5th Cir. 1969).[79]

[75] *Harper v. Kleindienst*, 362 F. Supp. at 744.

[76] Civil No. 74-648 (D. D. C. May 3, 1974) (unreported). The order of the court is reprinted in full in Appendix D, *infra*.

[77] 510 F. 2d 512, 520, n. 15 (2d Cir. 1975), cert. granted 423 U. S. 945 (1976).

[78] *Id.* at 520.

Other than *Harper II*, appellants have discovered only three cases in which the court was free to decide the question [80] that could be argued to support judicial review of Section 5 preclearance. Appellants do not rely on any of these cases in their brief.

The first case is *Evers v. State Board of Election Commissioners*.[81] Although the *Evers* court was not presented with, and did not decide, the question of reviewability *per se*, it did, in effect, hold that the Attorney General had acted improperly in failing to take action either objecting or affirmatively stating "no objection" to the voting change there challenged. The reason for the decision is not clear, but it seems to rest on one of two rationales: the court felt (1) that the Attorney General must take action either objecting or not objecting within the sixty days; or it felt (2) that the Attorney General must make a substantive finding that the voting change is either discriminatory or nondiscriminatory. Insofar as the decision rests on the first rationale, it is questionable under the explicit language of Section 5 which permits the Attorney General to take no

[79] *Id.* at n. 16.

[80] In a fourth case, *Harris v. Levi*, 416 F. Supp. 211 (D. D. C. 1976), appeal docketed, 9/2/76, No. 76-1823 (D. C. Cir. 1976), the District Court was bound by the Court of Appeals decision in *Harper II*, and thus was not free to consider the question of APA reviewability on its own. The remarkable feature of the *Harris* case, however, is the District Court's dismissal of three counts of the complaint on the ground that the Attorney General's preclearance decision was not reviewable under the APA. Count three is specially interesting because it alleged that the Attorney General's decision not to object was based on a legal standard of review (the one man, one vote principle) that is not embodied in Section 5. In *Harper II* the plaintiffs also alleged that the Attorney General's decision not to object was based on a legal standard of review (deference to a court decision) that is not embodied in Section 5. Under the *Harris* holding the "deference" standard would be substantive, and, therefore, not subject to APA review. See 416 F. Supp. at 215, n. 3.

[81] 327 F. Supp. 640 (S. D. Miss. 1971), appeal dismissed for failure timely to docket, 405 U. S. 1001 (1972).

action on a submission.[82] Insofar as it rests on the second rationale, it is questionable in light of this Court's subsequent opinion in *Georgia* which indicates that the Attorney General need not adopt a standard of Section 5 review that requires an affirmative finding, one way or the other, on the question of discrimination. *Evers* has not been generally followed by the lower federal courts and is rarely cited in other cases.[83]

The second case is *Perkins v. Kleindienst.*[84] *Perkins* involved a challenge to certain voting changes in Canton, Mississippi. Following this Court's decision in *Perkins v. Matthews,*[85] the changes were submitted to the Attorney General for Section 5 preclearance. After considering the submission, the Attorney General indicated that he would not object to the changes. Perkins and others then brought suit under the APA seeking review of the Attorney General's decision. They alleged in their complaint that the Attorney General failed to make a determination, as required by Section 5, of whether the voting changes had a discriminatory purpose or effect.[86] They further alleged that the Attorney General had misinterpreted the evidence before him and that this misinterpretation constituted an "error of law" under Section 5.[87] On the basis of these allegations they asked the District Court to "remand" the case to the Attorney General "for a reasoned decision . . . that will accord with the law" and to retain jurisdiction to review the new decision after remand.[88] The District Court

[82] See *supra*, 38.

[83] *Harper v. Kleindienst* is the notable exception. See 362 F. Supp. at 745.

[84] Civil Action No. 1309-72 (D. D. C. Nov. 2, 1972) (unreported). The order is reprinted in full in Appendix E, *infra*. *Perkins* was also relied on by the *Harper II* district court. See 362 F. Supp. at 745.

[85] 400 U. S. 379 (1971).

[86] *Perkins v. Kleindienst*, Civil Action No. 1309-72 (D. D. C. 1972).

[86] Complaint Para. 23, 24, *Perkins v. Kleindienst*, Civil Action No. 1309-72 (D. D. C. 1972). The complaint is reprinted in full in Appendix F, *infra*.

[87] *Id.*, Para. 25.

[88] *Id.*, Para. 29.

obliged by ordering the Attorney General to make "a reasoned decision in conformity with the requirements of Section 5 of the Voting Rights Act" and went on to require the new decision to include "specific findings and conclusions as to the discriminatory effect" of the challenged voting changes.[89] In *Perkins,* as in *Evers,* the question of reviewability was not discussed *per se,* although the court, in effect, reviewed the Attorney General's action under Section 5. Again the rationale for the decision is not clear, although the *Perkins* order suggests that Section 5 requires the Attorney General to make a substantive finding that the voting change is discriminatory or nondiscriminatory. For the reasons already stated, such a holding is questionable in light of this Court's decision in *Georgia.*

The third case, *Robinson v. Pottinger,*[90] involved a change to a mayor-council form of government in Montgomery, Alabama. This change was submitted to the Attorney General pursuant to Section 5. In his response to the submission the Attorney General stated that he did not object to the change under Section 5, but went on to comment that requirement of qualifying fees for candidates possibly violated the equal protection rights of those unable to pay them. In consequence, the submitting authorities brought a declaratory judgment action to remove the "cloud" of doubtful constitutionality created by the Attorney General's gratuitous remarks, joining him and the Assistant Attorney General for Civil Rights as defendants. The Attorney General moved to be dismissed as a party defendant, apparently on the ground, *inter alia,* that his unnecessary remarks did not affect the enforcement of the

[89] See Appendix E, *infra* 18a. The court's order in *Perkins* does not specify why the Attorney General's initial decision not to object was not "in conformity with the requirements of Section 5." Ironically, the District Court failed to set forth its own "findings and conclusions" concerning the Attorney General's actions in the case.

[90] 376 F. Supp. 615 (M.D. Ala. 1974), aff'd, 512 F. 2d 775 (5th Cir. 1975).

statute so that no actual case or controversy existed between him and the Montgomery officials. The District Court held that the Attorney General was a proper party because the plaintiffs were persons "adversely affected by agency action" within the meaning of the APA.[91] The case is a curious one, because the Attorney General's preclearance decision was not being brought into question. The District Court also stated that:

> Other than the correction of the alleged interference, *no direct relief is sought—nor can it be sought* —against the Attorney General and his Assistant.[92]

Thus, the case would appear to be no authority for the proposition that the Attorney General's preclearance decisions may be challenged in injunctive suits brought under the APA. Such decisions remain matters committed to agency discretion by law for purposes of APA review.

D

To permit APA review would be to authorize collateral attack against judgments entered by courts in the very 15th Amendment suits that Congress sought to preserve under Section 5.

"Collateral attack" may be defined as an attempt to avoid, defeat, or evade the effect of a judicial proceeding by means of some incidental proceeding not provided by law for the express purpose of attacking it.[93] If, as the Court of Appeals held in *Harper II*,[94] a party may litigate an Attorney General's non-objection at any time after the sixty-day period has run and subsequently force the Attorney General to enter an objection, as he in effect was ordered to do

[91] 5 U. S. C. § 702.
[92] 376 F. Supp. 618 (emphasis added).
[93] *United Merchants & Mfgrs., Inc. v. South Carolina Electric & Gas Co.*, 113 F. Supp. 257, 262 (D. S. C. 1953); *Trustees of Somerset Academy v. Picher*, 90 F. 2d 741, 744 (1st Cir. 1937).
[94] 520 F. 2d at 60-61.

by the *Harper II* District Court,[95] then a party who unsuccessfully attacks a voting change in a traditional Fifteenth Amendment suit would be provided a ready means of avoiding the outcome of a judicial proceeding which he himself instigated and by which, as a party litigant, he ought, under normal principles of adjudication, to be bound. This is no hypothetical argument, since that is exactly what happened in this case.

Rather than pursuing his appeal from the *Harper I* decision, as he ought to have done, Harper instituted the *Harper II* suit to attack the Attorney General's non-objection and to force an objection to the Senate Plan. This was nothing more than a clever method of evading the consequences of the District Court's judgment in *Harper I* and also the risk that the judgment would be affirmed on appeal by this Court. Since Congress intended that parties who disagree with the Attorney General's non-objection should seek their remedies in Fifteenth Amendment suits, to allow this novel form of collateral attack in lieu of appeal would nullify the statutory scheme.

Under the rule in *Harper II* it would make no difference whether the Fifteenth Amendment suit had been instituted by the private parties before the Attorney General's non-objection was entered or after. An example will illustrate this point. In 1971, South Carolina submitted a change in the method of electing the Lee County Council to the Attorney General for Section 5 review.[96] The Attorney General responded by stating that he would not interpose objection to the change.[97] He gave no reasons or reasoning for his decision. Subsequently, a private party suit was initiated seeking an injunction against the change on

[95] 362 F. Supp. at 746.
[96] See Letter of Dec. 17, 1971, from David L. Norman to James H. Quackenbush, Jr., R., Document No. 5.
[97] *Id.*

Fifteenth Amendment grounds. The District Court held that the change was not racially discriminatory.[98]

If *Harper II* is good law, those same Lee County plaintiffs could now go to the District of Columbia and institute an action under the APA, alleging that the Attorney General's non-objection was in violation of his legal duty under Section 5. They could claim that he did not give a "reasoned decision" and therefore failed to exercise his independent judgment on the voting change. They could claim that his decision was based on an erroneous legal standard, for instance, failure to apply the correct burden of proof (rather than deference to a court decision). Such a claim would not be entirely frivolous, since by the Justice Department's own admission

> . . . § 5 was little used prior to 1969 and . . . the Department of Justice questioned its workability. Not until after the Supreme Court, in litigation brought under § 5 had begun to define the scope of § 5 . . . did the Department begin to develop standards and procedures for enforcing § 5.[99]

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[98] *Lloyd v. Alexander*, Civil Action No. 74-291 (D. S. C. Mar. 31, 1976) (unreported), appeal docketed 6/15/76, No. 76-1645 (4th Cir. 1976).

[99] Statement of J. Stanley Pottinger, *Hearings on H. R. 939 . . . Before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee*, 94th Cong., 1st Sess., Ser. No. 1, pt. 1, 169 (1975). This statement was corroborated by the testimony of Gerald W. Jones, Chief of the Voting Section of the Justice Department, in his deposition. Referring to Section 5 review prior to the implementation of the present submission procedures in September, 1971, Mr. Jones testified as follows:

> A. . . . I would not be able to say that any particular given standard was used at that time. As a matter of fact, that was one of the reasons for—that led up to the creation of the administrative procedure, so that there would be articulated consistent procedures that would govern the administration of the Section 5 evaluation process.
>
> Q. Are you saying there were no standards used at that time, that the department itself had no standards that it applied consistently and uniformly?
>
> A. None that I was aware of, except to the extent of making a judgment as to whether or not the change had the potential of racial discrimination. *(cont.)*
>
> * * * *

Thus, it would be possible to claim that the Attorney General had not performed his statutory duty and to seek a court order requiring him to object, as was done in *Harper II*. The adverse adjudication in the Fifteenth Amendment action could thereby be evaded and ignored.

Such a procedure is not only an affront to the conventional theory of adjudication and appellate review; it would also mean that the State could never rely on the finality and binding effect of a judicial decision permitting it to enforce a voting change. Indeed, one need not posit a judicial decision in the illustration, since a plaintiff could simply short-circuit the Section 5 scheme altogether and bring the Administrative Procedure Act suit without bothering to bring a traditional action first. [100] This would create a par-

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[99] *(cont.)* Q. Prior to the effective date of the present Section 5 submission procedures, was there any particular type of data the department required submitting authorities to send along with submissions?

A. As far as I can recall, it was strictly an ad hoc thing, that whoever was reviewing a particular submission used his own judgment as to what information he would need and sought to get it.

No, no rules at all that I am aware of. (A. 30-31.)

James P. Turner, the Deputy Assistant General for the Civil Rights Division, likewise testified:

> [V]irtually all of the time and resources the Division had across the board were consumed in designating counties for examiners, servicing those examiners, setting up forms for examiners and observers to use, instructing observers, selecting places where observers were to go. It was pretty much a year-round project. During that period [1965-1967], Section 5 just did not get any significant attention.
>
> * * * *
>
> [W]e did change the approach from one which was essentially where we set out to find out whether or not there was discrimination, to one where . . . the submitting authority was required to . . . prove the [absence] of discrimination.
>
> * * * *
>
> Q. Would it be accurate to say that prior to the subject date of the new procedures [28 C. F. R. § 51 et seq.] . . . that objection was interposed only in those cases where the Department had reached the conclusion that the effect of the change would be in some way to be to abridge or deny voting rights of minorities?
>
> A. I think that is generally accurate. (A. 43-44.)

[100] Judge MacKinnon recognized this point in *Harper II:* "The majority has taken the first step to developing a means of judicial review which could ultimately supplant the 'subsequent action to enjoin enforcement' which Congress so carefully preserved in Section 5." 520 F. 2d at 74.

ticularly acute problem for South Carolina, since it was the only State that consistently submitted its voting changes before 1971,[101] the period when it could most plausibly be contended that the Attorney General's failure to object or give a "reasoned decision" constituted a breach of his Section 5 duty.

E

A single judge acting under the APA has no jurisdiction to determine questions arising under Section 5, which Congress has mandated "shall be determined by a court of three judges."

In *Allen v. State Board of Elections,*[102] this Court was called upon to construe that portion of Section 5 providing that

> Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of Section 2284 of Title 28.

The Court did so in the following language:

> As we have interpreted § 5, suits involving the section may be brought in at least three ways. First, of course, the State may institute a declaratory judgment action. Second, an individual may bring a suit for declaratory judgment and injunctive relief, claiming that a state requirement is covered by § 5, but has not been subjected to the required federal scrutiny. Third, the Attorney General may bring an injunctive action to prohibit the enforcement of a new regulation because of the State's failure to obtain approval under § 5. All

[101] "[O]nly South Carolina has complied rigorously with § 5. Through June, 1969, it submitted 252 changes for approval, including all three annexations (and one consolidation) that were approved by the state legislature between 1965 and 1969." *Perkins v. Matthews,* 400 U. S. 379, 393, n. 11 (1971) (per Brennan, J.). Through 1970 South Carolina submitted approximately 441 changes to the Attorney General. In approximately 164 cases the Attorney General made no response to the submission within the sixty day period. *Hearings on H. R. 939 . . . Before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee,* 94th Cong., 1st Sess., Ser. No. 1, pt. 1, 537 (1975).

[102] 393 U. S. 544 (1969).

> these suits may be viewed as being brought "under" § 5. The issue is whether the language "under this section" should be interpreted as authorizing a three-judge action in these suits.[103]

Noting that statutes providing for three-judge courts must be strictly construed, the Court went on to say:

> . . . Notwithstanding the problems for judicial administration, Congress has determined that three-judge courts are desirable in a number of circumstances involving confrontations between state and federal power or in circumstances involving a potential for substantial interference with government administration. The Voting Rights Act of 1965 is an example. Federal supervision over the enforcement of state legislation always poses difficult problems for our federal system. The problems are especially difficult when the enforcement of state enactments may be enjoined and state election procedures suspended because the State has failed to comply with a federal approval procedure.
>
> In drafting § 5, Congress apparently concluded that if the governing authorities of a State differ with the Attorney General of the United States concerning the purpose or effect of a change in voting procedures, it is inappropriate to have that difference resolved by a single district judge. The clash between federal and state power and the potential disruption to state government are apparent. There is no less a clash and potential for disruption when the disagreement concerns whether a state enactment is subject to § 5. The result of both suits can be an injunction prohibiting the State from enforcing its election laws. Although a suit brought by the individual citizen may not involve the same federal-state confrontation, the potential for disruption of state election procedures remains.[104]

[103] *Id.* at 561.

[104] *Id.* at 562-563.

Since the Court's decision in *Allen,* Congress has had two opportunities to modify the three-judge court requirement of Section 5. But in both 1970 and 1975 Congress left the requirement unchanged. Moreover, when Congress repealed the general three-judge court statute in 1976, it was careful to preserve the three-judge court requirement in cases involving statewide reapportionment and cases dealing with Section 5 of the Voting Rights Act.[105]

The Congressional command that Section 5 questions be decided by a court of three judges would be violated if the Attorney General's Section 5 preclearance decisions could be called into question before a single judge under the APA. *Harper II* itself demonstrates this. In the language of *Allen, Harper II* was a suit brought by an individual "for declaratory and injunctive relief, claiming that a state requirement is covered by § 5, but has not been subjected to the required federal scrutiny." The complaint in *Harper II* expressly alleged that the Senate Plan was covered by Section 5[106] and that the Attorney General "failed to make the determinations *required under Section 5 of the Voting Rights Act.*"[107] Likewise, the *Harper II* District Court stated:

> The *sole* issue in this case is whether the Attorney General has fulfilled his duties *under Section 5 of the Voting Rights Act.*[108]

As both the plaintiffs and the judge recognized, the resolution of the issue in *Harper II* necessarily involved the District Court in determination of the scope, meaning, and application of Section 5. A single judge, acting under the APA, had no jurisdiction to decide such a case.

In *United States v. Cohan,*[109] the Fifth Circuit Court of Appeals had before it a case in which a single-judge district court had decided a question substantially similar to that in *Harper II, i.e.,* whether the Attorney General was required to justify a Section 5 objection by giving a "reasoned decision." It was argued that single-judge jurisdiction was appropriate because an injunction was not being sought against a statewide enactment. The Court of Appeals held that it had no jurisdiction to hear the appeal from the single judge's determination, since under *Allen* the initial questions concerning the requirements of Section 5 should have been determined by a three-judge court.

Similarly, in *Sumter County Democratic Executive Committee v. Dearman,*[110] which concerned the seemingly trivial shift in certification of names of party candidates for the general election ballot from certification by the local executive committee chairman to certification by the committee secretary, a single district judge refused to grant relief and the plaintiffs appealed. The District Court had not passed on the merits of whether the change in certification procedure was discriminatory, but found only that the executive committee had delegated authority to certify to the secretary. In remanding the case for the convening of a three-judge district court, the Court of Appeals observed:

> The teaching of *Allen* is clear. Congress has mandated "the disputes involving the coverage of § 5 be determined by a district court of three judges."[111]

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[105] See P. L. 94-381, 90 STAT. 1119 (1976). Section 3 of the statute amends 28 U. S. C. § 2284(a) to preserve three-judge jurisdiction in statewide reapportionment suits. The legislative history of the statute makes clear that the three-judge requirement is also to be retained in Section 5 suits. See, *e. g.,* S. Rep. No. 204, 94th Cong., 1st Sess., 9 (1975): "Three-judge courts would continue to be required . . . in cases under the Voting Rights Act of 1965, 42 U. S. C. section . . . 1973c [Section 5] . . ." See also 122 CONG. REC. H8144-45 (Daily ed. Aug. 2, 1976) (Mr. Railsback).

[106] Complaint, Para. 18, A. 22.

[107] *Id.,* Para. 21, A. 23 (emphasis added).

[108] 362 F. Supp. at 744 (emphasis added).

[109] 470 F. 2d 503 (5th Cir. 1972).

[110] 514 F. 2d 1168 (5th Cir. 1975).

[111] *Id.* at 1170 (citation omitted.)

In *Harper II* the question of three-judge jurisdiction was raised for the first time on appeal. Unlike the Court of Appeals for the Fifth Circuit in the cases just cited, the Court of Appeals for the District of Columbia Circuit upheld single-judge jurisdiction. It reasoned that *Allen* did not apply because a suit against the Attorney General under the APA could not be "equate[d] to a single-judge decision on the merits of the Section 5 issues posed by a submission."[112] The Court of Appeals thus implied that a three-judge court is required only when the court is asked to pass on the merits of the discriminatory purpose and effect of a voting change, which it was not being asked to do in *Harper II*. But such reasoning is contrary to the teaching of *Allen* that all questions arising under Section 5, not merely questions on the merits of a voting change, are to be decided by a court of three judges.

The Court of Appeals also attempted to distinguish *Allen* on the ground that it involved a suit for an injunction against a state law which "portended disruption of state processes designed for its administration,"[113] while *Harper II* sought an injunction only against the Attorney General. The Court of Appeals conceded, however, that the ultimate effect of the APA suit would be to "generate 'a potential for substantial interference with government administration,'"[114] thus contradicting its own reasoning. It dismissed this disruption as being "no greater than any instance in which the Attorney General on state's request executes the function assigned by Section 5,"[115] an argument that ignored the fact that the State had already obtained successful preclearance of the Senate Plan.[116]

[112] 520 F. 2d at 63.
[113] 520 F. 2d at 63.
[114] *Id.* at 64.
[115] *Id.*

Finally, the Court of Appeals reasoned that single-judge jurisdiction was proper because

> The Supreme Court has frequently cautioned that statutory provisions summoning three-judge federal district courts are to be strictly construed. This canon is to be observed, as scrupulously as elsewhere, with respect to calls of that nature in the Voting Rights Act.[117]

Of course, the teaching of *Allen* is exactly the opposite of that stated in the quotation. After noting that the normal rule is to construe three-judge statutes strictly, this Court elaborated in *Allen* on the extradordinary nature of Section 5 and construed its three-judge provision broadly. Congress has also made it clear, by carefully preserving three-judge courts under Section 5 while repealing the requirement in most other cases, that the canon of strict construction is *not* to be observed, "as scrupulously as elsewhere," with respect to Section 5 cases.

III

The Attorney General did not abuse his discretion by deferring to a judicial determination that the Senate Plan does not abridge the rights of black voters in South Carolina.

Assuming, *arguendo,* that the Attorney General's decision not to object to the Senate Plan was reviewable and that a three-judge court was not required for that purpose, the judgment below ought nevertheless to be affirmed.

[116] One reason a suit like *Harper II* will be initiated is that the State has successfully obtained preclearance. In all such cases, the potential for disruption of orderly enforcement of voting, changes will be greater as a result of the suit, because the potential for suspension of the State law under Section 5 has been removed by successful preclearance.
[117] 520 F. 2d at 63 (footnotes omitted).

When the Senate Plan was submitted to the Attorney General, he had voluminous information before him with which to evaluate the Plan.[118] He had just recently studied the 1971 Plans in detail on the basis of the same information. As to those previous plans he had reached no affirmative conclusion that they were racially discriminatory, but had simply been

> *unable to conclude* . . . that either proposed Plan A or Plan B will not have the effect of abridging the right of black citizens of South Carolina to vote on account of race or color.[119]

Thus the situation was one in which the evidence was in equipoise and the Attorney General was unable to reach an affirmative conclusion.

Shortly thereafter the Attorney General was called upon to evaluate the Senate Plan on the basis of the same detailed information. The Attorney General studied the Senate Plan for seven weeks before reaching a decision. However, in addition to the information previously before him, the Attorney General also had available, after May 23, 1972, the opinion of the *Harper I* court that the Senate Plan satisfied the requirements of the Fifteenth Amendment. The Attorney General, after evaluating the Senate Plan for seven weeks, decided to defer to the decision in *Harper I* and on that basis stated that he would interpose no objection to the Plan.[120]

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[118] See Defendants' Motion to Dismiss of October 16, 1972, *Harper v. Kleindienst*, Civil Action No. 1607-72 (D. D. C. 1972), Appendix A, *infra*, at 2a.

[119] Letter of March 6, 1972, from David L. Norman to Daniel R. McLeod, A. 26. (Emphasis added.)

[120] No new information was submitted to the Attorney General a year later when he was reviewing the Plan pursuant to the *Harper II* court order. After this court-ordered review the Attorney General concluded for the first time that the Plan had a racially discriminatory effect. See Br. App., Appendix B, 8a. However, this conclusion was based upon the "possible" discriminatory effect of multimember districts rather than any evidence of *actual* discriminatory effect, upon the *(cont.)*

A

It was within the Attorney General's discretion to consider a judicial finding that was relevant to a matter before him.

As we have already observed,[121] this Court in *Georgia* found that Section 5 does not specify how the Attorney General is to perform his preclearance function. It is not necessary to find that the way in which the Attorney General discharged his Section 5 duty was his only possible choice in order to find that he was acting reasonably within the scope of his discretion. Thus, it does not follow from the proposition that it may have been legally permissible for the Attorney General to reach his decision without regard to the *Harper I* case, that the Attorney General was incorrect to consider the finding of nondiscrimination in *Harper I* and, in weighing it against the other evidence before him, to give it controlling weight.[122]

Since the substantive standards of the Fifteenth Amendment are explicitly incorporated into Section 5 of the Voting Rights Act,[123] it could hardly be deemed arbitrary for the Attorney General to consider the Fifteenth Amend-

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[120] *(cont.)* fact that South Carolina had a "white" primmary until 1947, and upon the fact that it would be statistically possible to draw a single-member districting plan containing "four or five election districts with black population majorities." *Id.* 6a-8a. In view of this Court's decisions in *City of Richmond v. United States*, 422 U. S. 358 (1975), and *Beer v. United States*, 425 U. S. 130 (1976), it is doubtful that the Attorney General's basis for objection is legally correct.

[121] *Supra*, 37 at n. 68 and accompanying text.

[122] A serious objection to the order in *Harper II* directing the Attorney General not to consider the *Harper* I finding in making his determination is that this Court in *Georgia* held that it was within the Attorney General's discretion to determine what information he would need to consider in passing on a submission. *Georgia v. United States*, 411 U. S. at 539-40. Thus, despite all claims to the contrary in *Harper II*, the District Judge was injecting herself into the Attorney General's decision making process and assuming his Section 5 function of deciding what evidence to consider.

[123] *South Carolina v. Katzenbach*, 383 U. S. 301, 308-315 (1966); *Allen v. State Board of Elections*, 393 U. S. 544, 589 (1969) (Harlan, J., concurring in part and dissenting in part); *City of Richmond v. United States*, 422 U. S. 358 (1975).

ment finding of the *Harper I* Court. It is this very congruence of the substantive standard under the Amendment and the Act that led this Court in *Connor v. Johnson,* [124] to hold unanimously that judicially fashioned voting changes need not be submitted to the Attorney General under Section 5. Since both the *Harper I* court and the Attorney General were concerned with whether the Senate Plan would deny or abridge the right to vote on account of race or color, the court's finding on the matter was relevant information which the Attorney General could consider. Conceivably, as a result of discovery under the Federal Rules of Civil Procedure, evidence would be presented to the District Court which the Attorney General did not have before him. Conceivably, in the adversary context of litigation, the arguments for and against the Senate Plan would be more fully developed and the issues more sharply drawn than they would be in the cold submission record before the Attorney General. There was nothing, therefore, which was unreasonable about his considering the *Harper I* finding in making his own determination not to object.

B

The Attorney General's decision to defer to a judicial determination that the Senate Plan is not discriminatory rested on a policy implicity approved by this Court and was not an abuse of his discretion.

In addition, there was a substantial legal reason why the Attorney General might decide that deference to the *Harper I* court was proper. In the *Allen* case, this Court was presented with the argument that if Section 5 were construed to cover reapportionment plans a conflict between the executive and judicial branches would be built into the Voting Rights Act. The Court noted the potential for friction, but did not reach the question, as it was hypothetical on the facts of the case. [125] In *Georgia v. United States,* the same argument was again presented. [126] However, by that time the Attorney General had adopted administrative procedures, including a procedure of deferring to federal court decisions in litigation over changes which had also been submitted for preclearance. In his brief, then Solicitor General Griswold specifically mentioned these procedures in response to the State's argument on the point.[127] In its opinion, the Court reasoned that in view of the Attorney General's procedures, the problem foreshadowed in *Allen* had failed to materialize.

> Where a plan has been submitted to the Attorney General and is at the same time being litigated with respect to a Fifteenth Amendment claim the Attorney General has deferred to the judicial determination regarding racial discrimination.[128]

Thus, this Court implicitly approved deferral as a reasonable exercise of the Attorney General's discretion in administering Section 5.

Appellants argue that this Court's opinion in *Connor v. Waller,*[129] shows that the Attorney General should not have deferred to the decision in *Harper I.*[130] However, this Court was not laying down any broad new principle of law in *Waller.* On the contrary, it would appear that the holding therein was applicable only to the very unusual situation presented by that appeal. *Waller* was the third appeal to come up to this Court from the protracted litigation over legislative reapportionment in *Mississippi.*[131] In its order

[124] 402 U. S. 690 (1971).

[125] *Allen,* 393 U. S. at 569.
[126] 411 U. S. 534 at n. 6.
[127] See *Allen v. State Board of Elections,* Brief for the United States, at 25-27.
[128] *Georgia v. United States,* 411 U. S. 535 at n.6.
[129] 421 U. S. 656 (1975).
[130] Br. App. 21, n. 25.
[131] The history of the litigation is outlined in *Connor v. Coleman,* 425 U. S. 675 (1976).

of May 22, 1975, from which appeal was being taken, the Mississippi District Court held that two legislatively enacted reapportionment plans did not have to be submitted to the Attorney General for Section 5 preclearance and had authorized their use in the upcoming elections. The District Court's holding that the reapportionment plans were not covered by Section 5 was clearly erroneous in view of this Court's decision in *Georgia v. United States*.[132] With the 1975 primary elections only a few weeks away, the case reached this Court. The State of Mississippi did not file a brief on the merits.[133] No argument was heard by the Court. In a short *per curiam* opinion the Court reversed the May 22d order of the District Court, stating that the legislatively enacted reapportionment plans

> are not now and will not be effective as laws until and unless cleared pursuant to § 5.[134]

We interpret the additional holding of the Court that it was error to have given constitutional approval to the plans as a caution to the District Court not to order them into effect on its own motion as interim plans for the 1975 elections. This interpretation makes sense when one considers the prior history of the litigation from *Connor v. Johnson* onward. It is also reinforced by the last paragraph of the *per curiam* opinion and by Mr. Justice Marshall's concurrence, both of which indicate that the Court foresaw that because of the imminence of the elections there might be an attempt to implement the two plans by court order before preclearance was obtained. This, and no more, seems to have been the ruling in *Waller*. Since South Carolina has

[132] 411 U. S. 526 (1973).

[133] The Attorney General of Mississippi did file a memorandum response to certain questions propounded by the Court. See Memorandum Brief of Appellees on the Applicability of Section 5 of the Voting Rights Act of 1965, as amended, 42 U. S. C. § 1973c, filed June 2, 1975. The Court consolidated consideration on the stay motion with consideration on the merits.

[134] 421 U. S. at 656.

never sought to evade the requirements of Section 5 under color of a court order, or otherwise, *Waller* can have no application to this case.

The State of South Carolina is the only covered jurisdiction that has complied with Section 5 of the Voting Rights Act from the beginning. In obedience to that statute it submitted the Senate Plan to the Attorney General and was successful in obtaining preclearance. Preclearance came not as a result of any stratagem on the part of the State, but as a result of a decision made by the Attorney General in the exercise of his discretion under Section 5. That decision was within the scope of his authority to make. It was not unreasonable or arbitrary. To hold now that the Senate Plan can no longer be enforced would be to disrupt the process by which the people of South Carolina elect their representatives in one chamber of the General Assembly. It would deprive those who have been duly elected of the offices to which the people have called them. It would interrupt the conduct of orderly government in the legislative branch. Such consequences should not be visited on South Carolina and its citizens merely because appellants are dissatisfied that the Senate Plan was precleared. They have a proper judicial forum for litigating their claims if they desire to do so. Appellants no less than South Carolina should obey the requirements of Section 5.

CONCLUSION

For all the reasons stated above, the judgment of the District Court should be affirmed.

Respectfully submitted,

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APPENDICES

APPENDIX A

Defendants' Motion to Dismiss of October 16, 1972, *Harper v. Kliendienst,* C. A. No. 1607-72 (D. D. C. 1972).

[Caption omitted in printing] .

MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Defendants, by their undersigned attorneys, pursuant to Rule 12(b) (1), (6) and (7), of the Federal Rules of Civil Procedure, hereby move to dismiss the above-entitled action on the grounds that the Court lacks jurisdiction over the subject matter of the action; the Complaint fails to state a claim upon which relief can be granted; and plaintiffs have failed to join parties who are indispensable to the action under Rule 19 of the Federal Rules of Civil Procedure. Alternatively, defendants move for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on the ground that there is no genuine issue as to any material fact and defendants are entitled to judgment as a matter of law.

In support of this Motion, the Court is respectfully referred to the affidavit of Assistant Attorney General Norman, attached hereto and to the Statement of Material Facts as to which there is no genuine issue and the Memorandum in Support of Defendants' Motion, filed herewith.

Respectfully submitted,

HARLINGTON WOOD, JR.,
Assistant Attorney General,

HAROLD H. TITUS, JR.,
United States Attorney,

HARLAND F. LEATHERS,
JEFFREY AXELRAD,
Attorneys, Department of Justice,
Attorneys for Defendants.

AFFIDAVIT

CITY OF WASHINGTON
DISTRICT OF COLUMBIA } SS

DAVID L. NORMAN, being first duly sworn, deposes and says:

1. I am the Assistant Attorney General in charge of the Civil Rights Division of the Department of Justice.

2. The records of the Department of Justice reflect that on May 12, 1972, the Department of Justice received from the Office of the Attorney General of South Carolina a copy of Act 1205 (S2-25) and supporting information submitted pursuant to Section 5 of the Voting Rights Act of 1965. Said Act relates to the reapportionment of the South Carolina State Senate. In addition, Section 3 of the Act provides for numbered seats in the South Carolina House of Representatives. A copy of the letter is attached as Exhibit A.

3. Pursuant to the Department of Justice Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 CFR 51, personnel of the Civil Rights Division of the Department of Justice made a preliminary review and determined that Act 1205 and the information submitted on May 12, 1972, along with information in our files obtained in the course of the Department's consideration of a previously submitted reapportionment plan, constituted a complete submission as defined in the published guidelines (28 CFR 51.10). Pursuant to the guidelines (28 CFR 51.22) expedited consideration of the submission was requested by the State of South Carolina to enable it to meet its election timetable.

4. By letter dated June 30, on behalf of the Attorney General, I informed the South Carolina Attorney General that no objection would be interposed to the implementation of the Senate reapportionment plan contained in Act 1205, but that an objection was being made to the implementation of Section 3 of Act 1205 (numbered seats in the House). A copy of that letter is attached as Exhibit B.

5. On May 30, 1972, the Department received from the South Carolina Attorney General a copy of Act 1204, an act relating to the use of numbered seats in all multi-member elective bodies in the State of South Carolina.

Pursuant to the published guidelines, expedited consideration of Act 1204 was requested by the State in view of upcoming elections. After a preliminary review indicated that additional information was needed, a request for the necessary additional information was made (see letter of June 16, 1972, copy attached as Exhibit B-1). Additional information was received on June 5, 9, 12, and 19, 1972. By my letter dated June 19, 1972, the Department of Justice acknowledged that it had sufficient information to review Act 1204. A copy of that letter is attached as Exhibit C.

/s/ DAVID L. NORMAN,
Assistant Attorney General,
Civil Rights Division.

Sworn to and subscribed
before me this 19th
day of September 1972.

/s/ VALERIE PRATHER,
Notary Public.

My commission expires: January 31, 1977.

[Exhibits omitted in printing]

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

1. Act 1205 of the General Assembly of South Carolina was submitted to the Attorney General by letter from the Attorney General in South Carolina dated May 9, 1972, received by the Department of Justice on May 12, 1972.

2. The Justice Department determined that the May 12, 1972 submission was complete.

3. On June 30, 1972 the Assistant Attorney General in charge of the Civil Rights Division, on behalf of the Attorney General informed the South Carolina Attorney General that no objection would be interposed to the implementations of the Senate reapportionment plan contained in Act 1205.

Respectfully submitted,

HARLINGTON WOOD, JR.,
Assistant Attorney General,

HAROLD H. TITUS, JR.,
United States Attorney,

HARLAND F. LEATHERS.

[Certificate of service omitted in printing]

APPENDIX B

Exhibit No. 1 to Deposition of James P. Turner.

Memorandum for the United States of February 1, 1972, *McCollum v. West,* C. A. No. 71-1211 (D. S. C. 1972).

[Caption omitted in printing]

MEMORANDUM FOR THE UNITED STATES

This memorandum is submitted in response to this Court's request of December 30, 1971.

I. STATEMENT

On November 11, 1971, the State of South Carolina reapportioned its State Senate. On the same day two actions were filed in the United States District Court for the District of South Carolina attacking the new reapportionment statute. Both suits, *Twiggs v. West,* Civil Action No. 71-1106, and *McLeod v. West,* Civil Action No. 71-1123, allege that the reapportionment violates the Fourteenth Amendment one-man one-vote mandate. The plaintiff in *Twiggs* requested a three-judge district court pursuant to 28 U. S. C. § 2281, *et seq.*

On December 7, 1971, a third suit attacking the reapportionment was filed in the District Court for the District for South Carolina. This suit, *McCollum v. West,* Civil Action No. 71-1211, also attacked the South Carolina statute on the one-man one-vote Fourteenth Amendment basis but, in addition, alleged that the reapportionment violated rights of South Carolina black citizens guaranteed by the Fifteenth Amendment and Section 5 of the Voting Rights Act of 1965, as amended, 42 U. S. C. 1973c. The Fifteenth Amendment allegation in *McCollum* is that the reapportionment dilutes and cancels out the voting strength of cognizable racial minorities. *Complaint,* para. 11, p. 4. The Section 15 allegation in *McCollum* is that the State of South Carolina has neither obtained a declaratory judgement that the reapportionment is free of racial discrimination, nor has the statute been reviewed by the Attorney General and "found to be free of those violations for which the Voting Rights Act, 42 U. S. C. § 1973c was created." *Complaint,* para. 18, p. 5.

On November 19, 1971, the Attorney General of the State of South Carolina forwarded the reapportionment statute to the Attorney General of the United States. On December 29, 1971, pursuant to its guidelines for the submission of voting changes under Section 5 of the Voting Rights Act, (36 Fed. Register 18186, copy attached) the Department of Justice requested additional information necessary to make the submission complete (*Id.*, at page 18189, Section 51.18). The requested information was received in the Department on January 5, 1972, thus beginning the running of the 60-day period which the Attorney General has to make his determination. The deadline for the Attorney General to make his decision is March 6, 1972.

II. DISCUSSION

The questions upon which the Court desires the Attorney General to comment are:

1. "The jurisdiction of the District of South Carolina to proceed and determine any question arising under the Voting Rights Act of 1965, and related equal protection claims," and

2. "The apropriateness of this Court's proceeding to consider and determine any question arising under the doctrine of *Reynolds v. Sims* pending his (the Attorney General's) decision on the question submitted to him under the Voting Rights Act of 1965."

A. The Jurisdiction of the District of South Carolina, To Proceed and Determine Questions Arising Under the Voting Rights Act of 1965

Section 5 of the Voting Rights Act provides:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.

Several litigable questions may arise under Section 5—whether a change is covered by Section 5; whether the enforcement of a change should be enjoined for failure of the state or subdivision to obtain approval under Section 5; or, of course, whether a declaratory judgment of the type described in the statute should be entered. See *South Carolina v. Katzenbach*, 383 U. S. 301 (1966); *Allen v. Board of Elections*, 393 U. S. 544 (1969); *Perkins v. Matthews*, 400 U. S. 379 (1971). It is our perception of the statutory scheme that the District Court with standard jurisdiction for litigation in the area has jurisdiction to decide whether the proposed change is one that affects voting within the meaning of the statute and is different from the procedures which were in effect on November 1, 1964, (*Perkins v. Matthews, supra*) and to determine whether the requirements of Section 5 have been met by the State of South Carolina. *Allen v. Board of Elections, supra*. However, in view of the fact that the State of South Carolina has made a formal submission in compliance with

Section 5 it would appear that these two issues are not present in these cases.

The ultimate issue under Section 5, and the one still remaining insofar as the instant cases are concerned, is whether the proscribed purpose and effect are absent so that the change in question may be rendered enforceable by declaratory judgment or the failure to interpose an objection. This, however, is the lone issue relegated by the statute to the District Court for the District of Columbia or the Attorney General. *Perkins v. Matthews, supra; Allen v. Board of Elections, supra.*

Under the statutory scheme an objection by the Attorney General would have the effect of continuing the unenforceability of the change, since changes in voting practices or procedures such as those envisioned by the South Carolina reapportionment may not be enforced unless and until the state or local jurisdiction obtains an appropriate declaratory judgment from the United States District Court for the District of Columbia or the change is submitted to the Attorney General and he does not object to its implementation within 60 days of submission.* See *Allen v. Board of Elections, supra; Dyer v. Love,* 307 F. Supp. 974 (N. D. Miss. 1969).

We note that the Fifteenth Amendment questions presented in the McCollum case would necessarily involve some of the same considerations as the Attorney General would have to make in reaching his determination under Section 5. For that reason, we suggest that the Court might well wish to await the Attorney General's determination before devoting its time to those issues. Other courts have taken that position in their consideration of like situations.

In *Bacote v. Carter,* Civil Action No. 15748 (N. D. Ga. 1971), a private plaintiff attacked a Congressional redistricting plan which had been submitted to the Attorney General by the State of Georgia. A three-judge District

* Language in *Connor v. Johnson,* 402 U. S. 690 (1971), in an order upon application for stay, suggests that reapportionment plans devised by a District Court are not subject to Section 5. However, there an effort was being made to require submission pursuant to Section 5 of a plan which the court had devised and ordered into effect whereas here the plan was devised by the legislature and in fact has been submitted pursuant to Section 5.

Court on December 22, 1971, determined that it would not proceed with the case until the review proceedings had been completed by the Attorney General.

In *Bussie v. McKeithen,** Civil Action No. 71-202 (E. D. La. 1971), a consolidated hearing of several private actions attacking the proposed reapportionment of the Louisiana State Legislature, the Court stayed its proceedings until the Attorney General had reviewed the proposed plan.

In *Howell v. Mahan,** Civil Action No. 105-71-N (E. D. Va., May 24, 1971), judges sitting in three related cases concerning a Virginia reapportionment plan retained jurisdiction, but postponed decision until such time as the proposed reapportionment plan was submitted to and reviewed by the Attorney General pursuant to Section 5.

Similarly, the Court in *Scott v. Burkes,* Civil Action No. 4989 (S. D. Miss. 1971), approved a county reapportionment plan on the condition that such plan, which was then under submission, not be objected to by the Attorney General pursuant to Section 5.

B. **The Appropriateness of the Court's Consideration and Determination of Questions Arising Under the Doctrine of** *Reynolds v. Sims*

There is no question that the Court has jurisdiction over issues concerning the apportionment of state legislatures. *Reynolds v. Sims,* 377 U. S. 533 (1964). All three of the private actions now before this Court contain allegations that the proposed plan of reapportionment violates the one-man one-vote principle of *Reynolds.*

Section 5 of the Voting Rights Act of 1965 is couched in terms of discrimination on account of race or color. The purely Fourteenth Amendment one-man-one-vote issues raised in the *Reynolds* case would therefore not provide a basis for the Attorney General interposing an objection under Section 5 unless those issues were such as would result in the denying or abridging of the right to vote on account of race or color. However, since the Attorney General's determination goes to the enforceability of the plan of reapportionment, we submit that it would be most appropriate for the Court to defer ruling on the *Reynolds*

* Copy attached.

v. Sims issues until the Attorney General has completed his review under Section 5. (See cases cited on page 7, *supra.*) The plan is presently under review and, while the Attorney General has until March 6 to make his determination, should the Court or the parties desire, the review will be expedited pursuant to Section 51.22 of the Department's Section 5 guidelines.

III. CONCLUSION

For the foregoing reasons the United States submits that it would be appropriate for the Court to exercise its discretion and defer ruling on the issues before it until the Attorney General review procedures provided by Section 5 have been completed.

Respectfully submitted,

DAVID L. NORMAN,
Assistant Attorney General.

JOHN K. GRISSO,
United States Attorney.

/s/ GERALD W. JONES,
ROBERT R. RUSH,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

[Attachments omitted in printing]

[Certificate of service omitted in printing]

APPENDIX C

Opinion and Order of October 4, 1971, *Vinik v. Smyth*, No. Civ. 71-89 TUC WEC (D. Ariz. 1971).

[Caption omitted in printing]

OPINION AND ORDER

No. Civ-71-89 TUC WEC

Before Trask, Circuit Judge, and Craig and Copple, District Judges.

CRAIG, D. J.

In this class action filed July 8, 1971, the plaintiffs sought declaratory and injunctive relief to restrain the defendants from enforcing certain sections of the Arizona Revised Statutes [1] which would cancel all voter registrations existing on the day following the General Election in 1970, and at intervals of 10 years thereafter, and from refusing the right to vote to persons otherwise qualified but who had not re-registered after the statutory cancellation. The restraint sought was to continue unless and until full compliance had been made with Section 5 of the Voting Rights Act of 1965, as amended (42 U. S. C. § 1973(c)).[2]

The action was instituted pursuant to Section 5 of the Act and other relevant sections, [3] and a three-judge court was empaneled to hear it.

The immediate relief sought by plaintiffs was a temporary restraining order to enjoin the enforcement of the Arizona Statute with respect to a primary election to be held September 21, 1971, by the City of Tucson, Arizona, a municipal corporation, located in Pima County. The temporary restraining order was denied by this court September 14, 1971.

The denial of the application for temporary restraining order was appealed to the United States Supreme Court by way of application to the Supreme Court for a stay order directed to the United States District Court for the District of Arizona denying temporary relief.

On September 20, 1971, Mr. Justice Stewart, for the Court, denied the application of plaintiffs herein, and further ordered that persons in Pima County, Arizona "who would have been eligible to vote, but for the passage of

Arizona Revised Statutes 16-150D, Laws of Arizona 1970, C.151, § 12, shall be allowed to vote in the September 21, 1971, primary election, provided that their ballots shall be segregated and impounded subject to a prompt hearing on the merits of the underlying issues and further order by the District Court."

The primary election in the City of Tucson was held September 21, 1971, and pursuant to the order of the Supreme Court of the United States, dated September 20, 1971, the prescribed ballots were segregated and impounded.

The matter came on for hearing before this court September 30, 1971, on the defendants' Motion to Dismiss and the plaintiffs' Motion for Summary Judgment with affidavits filed by both parties.

Prior to the filing of the present action the constitutionality of A. R. S. § 16-150D, as amended, had been attacked in a three-judge District Court, cause No. Civ. 70-352, Phx., entitled *Leola Johnson, et al., v. Paul N. Marston, County Recorder for Maricopa County, Arizona, et al.* The claim was that the Arizona statute deprived the plaintiffs in that case, and their class, of equal protection of the laws, privileges and immunities and due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, and on the further ground that the statute violated the due process clause of the Fifth Amendment to the Constitution of the United States.

By opinion and order of this court dated November 27, 1970, this court denied the relief sought by plaintiffs in that action, and upheld the constitutionality of the Arizona statute in question.

On March 22, 1971, in *Johnson v. Marston,* 401 U. S. 968, the Supreme Court of the United States affirmed the opinion and order of this court.

Five days after the decision in *Johnson v. Marston* became final, and on March 27, 1971, the Director of the Census published in the Federal Register, 36 Fed. Reg. 5809, his determination made pursuant to 42 U. S. C. § 1973 (b) (2) that less than 50 percent of the persons of voting age residing in Pima County and seven other counties, voted in the presidential election of November, 1968.[4]

The parties to this action, as well as the court, agree that the revision of the Arizona Statute under consideration falls within the scope of Section 5 of the Voting Rights Act of 1965, as amended, as to the eight covered counties. *Perkins v. Matthews,* 400 U. S. 379 (1971). The action is likewise not foreclosed by *Johnson v. Marston, supra.* That being so, the principal issue now before the court is whether "the chief legal officer or other official" of the State of Arizona has complied with the provisions of Section 5. *Perkins v. Matthews, supra; Allen v. State Board of Elections,* 393 U. S. 544 (1969).

On that issue the Attorney General of Arizona pursuant to the proviso of Section 5, *supra,* on July 8, 1971, under the authentication of the Secretary of State of the State of Arizona, submitted to the Attorney General of the United States, the text of Chapter 151 of the Laws of 1970 of the State of Arizona containing amendments to Title 16 of the Arizona Revised Statutes, including Section 16-150D, as amended, the validity of which is questioned in this action. The Attorney General of Arizona included in that formal submission, not only the text of Chapter 151, *supra,* as Exhibit A, but also, as Exhibit B, Title 16 in its entirety with the changes made by Chapter 151 marked thereon, and a certified copy of House Bill 4 which constituted the introduction of Chapter 151, together with House and Senate Amendments thereto and explanatory material concerning legislative history and procedure. The submission was voluminous and detailed. It was received by the Department of Justice on July 12, 1971. If the sixty day period for Justice Department examination began on July 12, it would have expired on September 10, 1971. No evidence was introduced of any objection having been interposed to the legislative change in question, by the Attorney General of the United States at the hearing on September 30, 1971.

On August 2, 1971, the Attorney General of the United States requested further information of the Attorney General of Arizona, which was supplied to the Attorney General of the United States August 4, 1971, and received by that office August 9, 1971.

In an undated letter written about September 9 or 10, 1971, by the Justice Department to the Attorney General of Arizona, the Justice Department stated that it consid-

ered the furnishing of the additional material as effecting an extension of the 60 day period so that it would commence on August 9, 1971. In the meantime, the Department of Justice published proposed guidelines for the administration of Section 5 of the Voting Rights Act of 1965. The parties agreed that the guidelines became effective on September 10, 1971, or subsequent to the date of the submission by the Arizona officials. Those guidelines purport to define what constitutes a "submission" for the purpose of commencing the 60 day period and to give the Attorney General of the United States the authority to extend the time if the "submission" is considered insufficient by the guidelines as interpreted by the Attorney General.

The effect of the guidelines is to make indefinite and uncertain the language and meaning of a statute which is relatively clear. It is also apparent that in this case the statutory change about which complaint is made is definite, clear, concise and simple. It requires all voters to re-register after the 1970 elections and at ten year intervals thereafter. There are no complex or devious alterations in that section.

It would appear that the Congressional intent behind § 5 of the Voting Rights Act of 1965, as amended, was to provide for the early resolution of questions related to the validity of revisions of election laws of the several states and the political subdivisions thereof. In *Allen v. State Board of Elections, supra,* the Court stated (393 U. S. 549),

> "The provision for submission to the Attorney General merely gives the covered state *a rapid method* of rendering a new state election law enforceable." (Emphasis supplied)

We do not reach the question as to the authority of the Department of Justice to extend the 60 day period by the promulgation of proposed guidelines to the administration of Section 5. They were not in force and effect as of the date of this submission. We hold that the Attorney General of Arizona complied with the provisions of § 5 by his submission on July 8, 1971; that the 60 day period provided in § 5 of the Voting Rights Act of 1965, terminated upon the expiration of 60 days from the receipt of the submission by the Attorney General of the United States, *i.e.,*

September 10, 1971; that the Attorney General of the United States has not interposed an objection within the 60 day period following submission, and therefore, the Arizona Law, Chapter 151 of the Laws of 1970, may be enforced.

The Motion to Dismiss of the defendants is granted; the Motion for Summary Judgment of plaintiffs is denied;

IT IS SO ORDERED this 4th day of October, 1971.

/s/ OZELL M. TRASK,
United States Circuit Judge.

/s/ WALTER E. CRAIG,
United States District Judge.

/s/ WM. P. COPPLE,
United States District Judge.

Footnote 1 (Reference page 1)

The statute in question which was approved by the Governor on May 18, 1970, and became effective according to its terms from and after November 4, 1970, provided in pertinent part as follows:

> "On the day immediately following the general election in 1970 and at intervals of ten years thereafter, the county recorder shall cancel all voter registrations in his county." A. R. S. § 16-150D., as amended.

Footnote 2 (Reference page 2)

§ 5 of the Voting Rights Act of 1965, as amended, 42 U. S. C. § 1973(c), so far as it is pertinent to this action, provides:

> "Whenever a State or political subdivision * * * shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision * * * shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1968, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judg-

ment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure *may be enforced* without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, * * *." (Emphasis supplied)

Footnote 3 (Reference page 2)

42 U. S. C. § 1973(c) and 42 U. S. C. § 1983; 28 U. S. C. § 1343 and 28 U. S. C. § 2201.

Footnote 4 (Reference page 4)

The other seven counties which, together with Pima County, thus become the "covered counties" under the Voting Rights Act, are, Pinal, Navajo, Cochise, Coconino, Apache, Mohave, and Santa Cruz. The first election in any of the covered counties following the filing of the determination by the Director of the Census was the primary election in the City of Tucson.

APPENDIX D

Order of May 3, 1974, *Griffith v. United States of America,* C. A. No. 74-648 (D. D. C. 1974).

[Caption omitted in printing]

ORDER

Civil Action No. 74-648

This matter is before the Court on plaintiffs' Motion for a Stay. There is, as yet, no opposition. The Court, however, having reviewed the complaint and Motion, *sua sponte,* will dismiss the action.

The plaintiffs are apparently attempting to secure a review of the Attorney General's findings that certain plans submitted pursuant to the Voting Rights Act of 1965 by the State of New York have "the purpose or effect of abridging the right to vote because of race or color". (Letter of April 1, 1974, from Stanley Pottinger, Assistant Attorney General). Under the Voting Rights Act, 42 U. S. C. § 1973c, a request for review of the Attorney General's findings may be made *only* by the "State or political subdivision" covered by the Act. The plaintiffs, as individual Assemblymen from Kings County, lack standing under the Act to bring this action.

For the foregoing reasons, it is by the Court, this 3rd day of May 1974,

ORDERED that plaintiffs' Motion for a Stay be and hereby is denied; and it is further

ORDERED that plaintiffs' complaint (which the Court also treated as a request for convocation of a three-judge court under the Act, 42 U. S. C. § 1973c, even though such request was never made) should be and hereby is dismissed.

/s/ JUNE L. GREEN,
U. S. District Court Judge.
United States District Court
for the District of Columbia

APPENDIX E

Order of November 24, 1972, *Perkins v. Kleindienst,* C. A. No. 1309-72 (D. D. C. 1972).

[Caption omitted in printing.]

ORDER

Civil Action No. 1307-72

Upon consideration of the complaint, defendants' motion to dismiss, and plaintiffs' opposition thereto, it is by the Court this 2nd day of November, 1972,

ORDERED, that defendants' motion to dismiss be, and it hereby is, denied; and

FURTHER ORDERED, that this case be, and it hereby is, remanded to the defendant Attorney General of the United States for a reasoned decision in conformity with the requirements of section 5 of the Voting Rights Act, 42 U. S. C. § 1973c and the ruling of the United States Supreme Court in *Perkins v. Mathews,* 400 U. S. 379 (1971), such decision to include findings and conclusions as to the discriminatory effect of the City of Canton's actions in 1969 (1) in the shift from electing aldermen by wards to electing them at-large, and (2) in the expansion of the city's boundaries.

/s/ JOHN H. PRATT,
United States District Judge.

APPENDIX F

Complaint of June 30, 1972, *Perkins v. Kleindienst,* C. A. No. 1309-72 (D. D. C. 1972).

[Caption omitted in printing.]

COMPLAINT

1. This is a suit for a declaratory judgment that defendants Kleindienst and Norman unlawfully failed to object to certain changes in the election procedures of the City of Canton, Mississippi, which were submitted to the defendants under the provisions of section 5 of the Voting Rights Act, 42 U. S. C. § 1973c. That statute obligates the defendants to object to a submitted voting change unless there is proof that the change does not have a racially discriminatory purpose or effect. The defendants' violation of their statutory duty in this case abridged plaintiffs' right to be free from racial discrimination or dilution in voting.

2. The particular changes under attack are (1) a shift from electing aldermen by wards to electing them at-large, and (2) an expansion of the city's boundaries which increased the white percentage of the population by bringing in additional white voters while leaving out neighboring blacks.

Jurisdiction

3. Jurisdiction arises under 5 U. S. C. §§ 701-06, 28 U. S. C. §§ 1331, 1343(4), 1361 and 2201, and 42 U. S. C. § 1973c.

Parties

4a. Plaintiffs Ernest Perkins, John Nichols, Robert Chinn, Flonzie Goodloe, and Vera Collins are black citizens of the United States and residents and qualified electors of Canton, Mississippi. Plaintiffs Perkins, Nichols and Chinn sought municipal office in 1969. Some of the plaintiffs intend to seek municipal office in Canton again.

4b. Plaintiffs obtained an injunction against enforcement of the election changes described in paragraph 2 of this complaint because of Canton's failure to submit them for clearance pursuant to 42 U. S. C. § 1973c. *Perkins v. Matthews,* 400 U. S. 379 (1971).

4c. Each plaintiff sues in his own behalf and, pursuant to Rule 23(b)(2), Fed. R. Civ. P., on behalf of all black voters and black prospective candidates, as well as all other voters and prospective candidates who are threatened with injury by Canton's election changes. The class is so numerous that joinder of all members is impracticable. The questions of law and fact are common to the class. Plaintiffs' claims are typical of the claims of the class, and plaintiffs will fairly and adequately represent the interests of the class. Defendants have acted and refused to act on grounds generally applicable to the class, thereby making final relief appropriate with respect to the class as a whole.

5. Defendant Richard Kleindienst is the Attorney General of the United States of America, and, under section 5 of the Voting Rights Act, is the official designated to receive and act on voting changes submitted under that section. Defendant David L. Norman is an Assistant Attorney General of the United States of America, in charge of the Civil Rights Division of the United States Department of Justice, to whom defendant Kleindienst has delegated general responsibility for administering section 5, including the functions of deciding whether or not to object to submitted changes, and of signing letters announcing objections and nonobjections under section 5. Each defendant is sued in his official capacity.

Operation of Section 5 of the Voting Rights Act

6. The City of Canton, like all other subdivisions of the State of Mississippi, is covered under section 5 of the Voting Rights Act. 30 Fed. Reg. 9897 (Aug. 7, 1965).

7. A state or political subdivision covered by section 5 of the Voting Rights Act, 42 U. S. C. § 1973c, may not lawfully enforce a "voting prerequisite or qualification, or standard, practice or procedure different from that in force or effect on November 1, 1964" [hereinafter referred to as a "voting change"] unless it either obtains a declaratory judgment from the United States District Court for the District of Columbia that the submitted law "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color," or unless the voting change "has been submitted . . . to the Attorney General and the Attorney General has not

interposed an objection within sixty days after such submission."

8. The Attorney General's regulations concerning his decision whether or not to object to a voting change read, in pertinent part, as follows:

> "Section 5, in providing for submission to the Attorney General as an alternative to seeking a declaratory judgment from the U. S. District Court for the District of Columbia, imposes on the Attorney General what is essentially a judicial function. Therefore, the burden of proof on the submitting authority is the same in submitting changes to the Attorney General as it would be in submitting changes to the District Court for the District of Columbia. The Attorney General shall base his decision on a review of material presented by the submitting authority, relevant information provided by individuals or groups, and the results of any investigation conducted by the Department of Justice. If the Attorney General is satisfied that the submitted change does not have a racially discriminatory purpose or effect, he will not object to the change and will so notify the submitting authority. If the Attorney General determines that the submitted change has a racially discriminatory purpose or effect, he will enter an objection and will so notify the submitting authority. If the evidence as to the purpose or effect of the change is conflicting, and the Attorney General is unable to resolve the conflict within the 60-day period, he shall, consistent with the above-described burden of proof applicable in the District Court, enter an objection and so notify the submitting authority." 28 C. F. R. § 51.19.

Canton's Voting Changes

9. Canton is a city of 11,000 people. It has approximately 6,000 registered voters, who are approximately evenly divided between blacks and whites. The City is divided into four wards. Wards 1 and 2 are predominantly white; Wards 3 and 4 are predominantly black.

10. Officials and other white citizens of Canton have a long history of depriving black citizens of the right to

vote and of other rights guaranteed by the Constitution of the United States.

11. Until the passage of the Voting Rights Act, fewer than 200 blacks were registered to vote in Canton. No black has ever held elective office in Canton. Before 1969, no black had ever run for office in Canton. In that year, blacks ran for five of the six municipal offices.

12. Canton is governed by an elected Mayor and five elected Aldermen. The system in effect on November 1, 1964, and used in the 1965 elections provided for each of the four wards to elect one Alderman, and for the city-wide electorate to elect an Alderman-at-large and the Mayor.

13. For the 1969 elections, Canton adopted several voting changes which altered the system that had been in effect as of November 1, 1964. Two of those changes were (1) a shift from electing four of the five Aldermen by ward to electing all at-large; and (2) an expansion of the electorate in 1968 by annexing new territory containing a large number of white voters.

14. Both types of changes (shifting to at-large elections and altering city boundaries) have been commonly used to discriminate against black voters, a fact which has been recognized by the Supreme Court:

> ". . . [B]ased on the findings of an 18-month study of the operation of the Voting Rights Act by the United States Civil Rights Commission, the Commission's director reported to Congress that gerrymandering and boundary changes had become prime weapons for discriminating against Negro voters:
>
> > 'The history of white domination in the South has been one of adaptiveness, and the passage of the Voting Rights Act and the increased black registration that followed has resulted in new methods to maintain white control of the political process.
> >
> > 'For example, State legislatures and political party committees in Alabama and Mississippi have adopted laws or rules since the passage of the act which have had the purpose or effect of diluting the votes of newly enfranchised Negro voters.

> These measures have taken the form of switching to at-large elections where Negro voting strength is concentrated in particular election districts, facilitating the consolidation of predominantly Negro and predominatly white counties, and redrawing the lines of districts to divide concentrations of Negro voting strength.'"

Perkins v. Matthews, 400 U. S. 379, 389 (1971).

Submission of These Changes

15. The changes alleged in paragraph 13 were held in *Perkins v. Matthews,* 400 U. S. 379 (1971), to be voting changes which could not be enforced without section 5 clearance.

16. The City of Canton initially submitted the two changes (together with two other annexations which are not at issue here) to the Attorney General on January 7, 1972. On February 3, 1972, the Attorney General requested additional information from Canton, which was received on March 20, 1972. *See* Attachment A. Pursuant to the defendants' regulations, 28 C. F. R. § 51.18(a), the 60-day period was measured from the receipt of the additional information.

17. On May 10, 1972, plaintiffs wrote defendant Norman presenting facts and legal arguments to show why the changes were racially discriminatory, and refuting Canton's claims to the contrary. They urged that the Attorney General object to both the shift to at-large elections and the 1968 annexation. *See* Attachment B.

18. The City of Canton did not respond to, or seek to refute, the facts and arguments set forth in the aforesaid letter of May 10, 1972, although it was given the opportunity to do so.

19. The facts available to the defendants, when the decision was made, showed that the two changes at issue are discriminatory, as follows:

(a) the shift to at-large elections has had a discriminatory effect by diluting black votes;

(b) the 1968 annexation has had both a discriminatory purpose and a discriminatory effect because the boundary lines of the annexation were purposely

gerrymandered to include a large number of white people and to exclude a large number of neighboring black people; and

(c) in addition, the discrimination resulting from each change was aggravated by the combination of the two changes, because there were proportionately fewer blacks in the citywide electorate, and the citywide electorate would for the first time choose all the Aldermen.

The Defendants' Decision Not to Object

20. On May 19, 1972, Defendant Norman wrote to the City Attorney of Canton, notifying him that the Attorney General would not object to any of the voting changes submitted. *See* Attachment C.

21. The nonobjection letter was primarily or solely devoted to discussing a 1962 state statute providing for at-large municipal elections (which Canton had ignored in 1965). The 1962 statute was passed for the purpose of preventing blacks from winning elections in predominantly-black wards. The letter found that "the available facts do not persuade us that the decision to abide by state law in 1969 was racially oriented."

22. The nonobjection letter thus included or constituted a holding by the defendants that, in view of the 1962 statute, there was no showing that the purpose of Canton's change to at-large was discriminatory.

23. The letter made no findings or holdings as to the following questions:

(1) whether the change to at-large elections had a discriminatory effect;

(2) whether the 1968 annexation had a discriminatory purpose or effect; and

(3) whether the changes, in combination, had a discriminatory effect.

A finding or holding as to each of these matters is required under section 5 of the Voting Rights Act.

24. The defendants' failure to consider or decide the matters described in paragraph 23 violated their obligation under the statute, 42 U. S. C. § 1973c, the regulations, 28 C. F. R. § 51.19, and the principles established by their prior rulings.

25. The defendants' interpretation of the role of the 1962 statute, as set forth in their letter, was an error of law which violated the statute, 42 U. S. C. § 1973c.

Irreparable Injury

26. The plaintiffs and all members of their class will suffer irreparable and continuing injury if this court does not grant relief. Upcoming special elections, as well as regular elections in 1973 and thereafter, will be held at-large and with a surplus of illegally added white voters if the Attorney General's nonobjection letter is allowed to stand. Both these changes will abridge and deny plaintiffs' right to vote on account of race.

Relief

29. WHEREFORE, Plaintiffs pray that this court:

(1) advance this cause on the docket;

(2) declare that the defendants erred in not considering or deciding essential matters;

(3) declare that the defendants erred in their interpretation of the role of the 1962 statute;

(4) remand the case to the defendants for a reasoned decision and a new letter, promptly, that will accord with the law;

(5) retain jurisdiction to review the defendants' decision after remand; and

(6) award plaintiffs such other relief as this court may deem equitable.

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June 30, 1972.

[Attachments omitted in printing.]